

NON-CONFIDENTIAL

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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Misc. No. 14-111

REMBRANDT SOCIAL MEDIA, LP,  
*Plaintiff-Petitioner,*  
V.  
FACEBOOK, INC.,  
*Defendant-Respondent.*

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On Petition for Permission to Appeal an Order of The  
United States District Court for the Eastern District of Virginia  
in Case No. 13-cv-158, Judge T.S. Ellis, III

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**FACEBOOK, INC.'S NON-CONFIDENTIAL RESPONSE  
TO REMBRANDT SOCIAL MEDIA, LP'S PETITION  
FOR ALLOWANCE OF AN INTERLOCUTORY APPEAL**

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Heidi L. Keefe  
Mark R. Weinstein  
COOLEY LLP  
3175 Hanover Street  
Palo Alto, CA 94304

Michael G. Rhodes  
COOLEY LLP  
101 California Street, 5th Floor  
San Francisco, CA 94111

Thomas G. Hungar  
*Principal Attorney*  
Lucas C. Townsend  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036  
Tel: (202) 955-8500  
Fax: (202) 467-0539

*Attorneys for Defendant-Respondent Facebook, Inc.*

## CERTIFICATE OF INTEREST

Counsel for Defendant-Respondent Facebook, Inc. certifies the following:

1. The full name of every party or amicus represented by me is:

Facebook, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

The party named in the caption, Facebook, Inc., is the real party in interest.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

There are no such corporations or companies.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

**Gibson, Dunn & Crutcher LLP**

Thomas G. Hungar  
Lucas C. Townsend

**Cooley LLP**

Stephen R. Smith  
Jonathan G. Graves  
Phillip E. Morton  
Michael G. Rhodes  
Heidi L. Keefe  
Mark R. Weinstein  
John S. Kyle  
Elizabeth L. Stameshkin  
Stephen C. Neal  
Paul Batcher

December 26, 2013

Date

/s/ Thomas G. Hungar

Thomas G. Hungar

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Expert Rebuttal Report of Professor Marco Iansiti,  
Submitted as Exhibit 7 to Declaration of Paul Batcher  
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<sup>1</sup> To avoid duplicative numbering, Facebook's addendum continues the numbering of Rembrandt's addendum, beginning with ADD0244.

## INTRODUCTION

Rembrandt Social Media, LP is a non-practicing entity that has sued Facebook, Inc. for [REDACTED]<sup>2</sup> on the assertion that two minor software components added on to Facebook's website cause Facebook to infringe two of Rembrandt's patents. But Rembrandt has built its entire theory of damages on a single expert opinion of Mr. James Malackowski, whose estimate of a reasonable royalty is based on the entire stream of advertising revenue that Facebook allegedly derives from a set of features of its website, even though Rembrandt admits that those features do not independently infringe absent the two minor add-ons. The district court excluded Malackowski's opinion as unreliable and prejudicial, leaving Rembrandt with no permissible theory of damages on the eve of trial. Because that admissibility ruling controls whether there is any need to try this case (particularly to a jury), and with the consent of both parties, the district court certified its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Facebook agrees that the district court's ruling excluding Malackowski's opinion was properly certified under § 1292(b) and should be reviewed by this Court, but not for the reasons that Rembrandt articulates. Rather, granting this appeal is appropriate because, without the excluded testimony, Rembrandt has no

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<sup>2</sup> Rembrandt's damages estimate is confidential and has been redacted throughout the non-confidential version of Facebook's response. Fed. Cir. R. 27(m)(1)(B).

admissible theory of damages and, as a non-practicing entity, no equitable claim to injunctive relief. With no possibility of a meaningful remedy, Rembrandt would have no incentive or legal basis on which to proceed to trial and Facebook would be entitled to judgment as a matter of law. Thus, immediate appellate review would materially advance the ultimate resolution of the litigation. In addition, granting this appeal would allow this Court to correct the district court's erroneous holding that the entire market value rule ("EMVR") does not apply in this case. On these grounds, Facebook strongly supports immediate review.

## **BACKGROUND**

### **A. The Relevant Technology**

Facebook provides a free social networking service to more than 1 billion monthly users through its web address, <<http://www.facebook.com>>, as well as various other mobile platforms. ADD0055; ADD0135; ADD0386. Users who log into the Facebook website can access a number of web pages and use a number of features that allow members, *inter alia*, to share photos, videos, and information about themselves; receive updates on recent activities that have occurred on Facebook; or create pages for businesses and groups. ADD0055. Facebook has developed and introduced these features periodically over time. *See* ADD0055; ADD0160–62. For example, in September 2006 Facebook introduced the feature known as "News Feed," which displays updates, known as "stories," of the recent



activities of a user's friends. ADD0055. Another feature, "Timeline," displays basic information about each user and a history of his or her activities on Facebook; Facebook introduced this functionality in September 2004 under its former name, "Wall." ADD0055; ADD0161; ADD0392. The features known as "Photo/Video Sharing," which allows users to share media files, and "Groups," which allows self-selected groups of individuals to associate on Facebook, were also introduced before 2009. ADD0064; ADD0162.

Rembrandt is a non-practicing entity and owner by assignment of two patents, U.S. Patent Nos. 6,415,316 (the "'316 patent") and 6,289,362 (the "'362 patent"). ADD0050. Rembrandt has sued Facebook in the Eastern District of Virginia, claiming that two components added on to Facebook's software in 2009—known as BigPipe and Audience Symbol—infringe the '316 and '362 patents when used in conjunction with certain features of Facebook, including Timeline, News Feed, Groups, and Photo/Video Sharing. There is no dispute that those features successfully and independently existed on Facebook before the onset of any alleged infringement in 2009, and that Facebook continues to provide those features today through mobile applications without infringing. ADD0064; ADD0392.

BigPipe is a program developed by Facebook and introduced in the fall of 2009 that optimizes the speed at which certain web pages on Facebook are delivered from Facebook's servers to users' web browsers. ADD0056; ADD0385–86.

As Rembrandt's infringement expert has admitted, BigPipe is an "essential component" of all of Rembrandt's infringement theories, and Facebook would not infringe without BigPipe. ADD0056; ADD0064; ADD0311–12; ADD0315; ADD0320–21; ADD0361. BigPipe does not affect what content is displayed on a particular Facebook web page; rather, it allows portions of web pages to be delivered to users, on average, one second faster than earlier Facebook technologies. *See* ADD0056; *see also* ADD0260; ADD0282.

Audience Symbol, also introduced in 2009, is a small icon displayed on certain Facebook pages that signifies the audience of users who are allowed to view individual stories. ADD0057; ADD0386. As with BigPipe, Rembrandt's infringement expert has admitted that all of Rembrandt's infringement theories with respect to the '316 patent depend on the display of Audience Symbol on preexisting stories. ADD0056; ADD0316–17; ADD0330–31; *see also* ADD0321–23 (relying on Audience Symbol for infringement of the '362 patent with respect to photo and video stories).

## **B. Rembrandt's Theory Of Damages**

Rembrandt's sole theory of damages rests entirely on the expert report of Malackowski, Rembrandt's only damages expert. ADD0047. Malackowski did not offer any opinion on what portion, if any, of Facebook's advertising revenue is attributable to the addition of BigPipe and Audience Symbol. ADD0058. Rather,

he calculated a supposedly reasonable royalty based on an estimate of the total revenue stream from every feature of Facebook that utilizes the allegedly infringing software add-ons as components—including Timeline, News Feed, and Groups—as well as *additional* revenue from allegedly convoyed features, such as Photo/Video Sharing, that he claimed are “inextricably linked” to Timeline and News Feed.<sup>3</sup> See ADD0056; ADD0178; ADD0184; ADD0387–88.

To accomplish his top-down calculation, Malackowski began with Facebook’s total revenues during the alleged period of infringement, which he discounted in an attempt to exclude non-infringing mobile applications. ADD0058; ADD0166–67; ADD0410. Next, Malackowski relied on surveys conducted by Rembrandt’s experts that asked respondents to rank the relative “importance” of certain features of Facebook’s website—but not the accused BigPipe or Audience Symbol add-ons. ADD0180–83. Using the survey scores as a “proxy” for advertising revenue from the allegedly infringing and convoyed features, ADD0183, Malackowski concluded that over 65% of Facebook’s total revenue should be included in the royalty base. ADD0058; ADD0187; ADD0389; ADD0403.

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<sup>3</sup> Components are convoyed if they “together were considered to be components of a single assembly or parts of a complete machine, or they together constituted a functional unit.” *Am. Seating Co. v. USSC Grp., Inc.*, 514 F.3d 1262, 1268 (Fed. Cir. 2008) (internal quotation marks omitted). Other supposedly convoyed features for which Rembrandt seeks royalties include the Facebook features known as “Like,” “Share,” “Comment,” “Add Photos/Video,” “Photo Tagging,” “Find Friends,” and “Friend Request.” ADD0387.

Next, based on a comparison with licenses of supposedly similar technology, Malackowski proposed a range of 2.3% to 21.99% for a hypothetical royalty rate. ADD0058; ADD0233; ADD0390. Malackowski then purported to apply the factors for determining a reasonable royalty set forth in *Georgia-Pacific v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), again assuming that revenues from features of Facebook that are not themselves alleged to infringe apart from the BigPipe and Audience Symbol add-ons provide the relevant basis for damages. *See* ADD0216–27. He concluded that a reasonable royalty rate is 5–6%. ADD0058; ADD0234; ADD0390; ADD0406 & n.79.

Finally, multiplying his estimated royalty rate and his estimated royalty base, Malackowski arrived at what he asserted is a “reasonable royalty” of [REDACTED]. ADD0059; ADD0136; ADD0242; ADD406.

### **C. The District Court’s *Daubert* Ruling And Certification Order**

The district court excluded Malackowski’s opinions under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on two independent grounds. First, the court found Malackowski’s opinions unreliable and prejudicial because they failed to apportion damages to Facebook’s revenue from BigPipe and Audience Symbol, the improvements that Rembrandt claims give rise to the infringement. ADD0061–65. As the court found:

[A]llowing Rembrandt’s expert to use as the royalty base the entire value of Timeline, News Feed, Groups, and Photo/Video Sharing—all

of which can be used independently without infringing—while not using the value of BigPipe and Audience Symbol—the features that actually cause the alleged infringement—would be a mistake of the same kind as allowing Rembrandt’s expert to use the entire value of Facebook.

ADD0063. This error also infected Malackowski’s calculation of a royalty rate, the district court found, because he improperly assumed that Facebook would have paid royalties to use features (like Timeline and News Feed) that it had used before 2009—and continues to use in mobile applications—without infringing. *See* ADD0064 (“If Facebook did not pay Rembrandt to license the patents, it could have continued to use those four features without infringing.”); *see also* ADD0064–65 (finding that calculation of royalty rate was unreliable).

Second, the district court excluded Malackowski’s opinion because it employed a “suspect and unreliable” methodology that assumed, without analysis, that the results of surveys ranking the “importance” of various Facebook features were a reliable proxy for Facebook’s revenue from those features. ADD0065–66.

The district court declined to exclude Malackowski’s opinion on several other grounds. As relevant here, the district court disagreed with Facebook’s argument that Malackowski’s opinion violated the EMVR by basing damages on total revenue from Facebook features that do not independently infringe—including Timeline, News Feed, Groups, and the supposed convoyed features—without showing that the infringing components drive advertising demand for those fea-

tures. In the court’s view, because Malackowski had performed “two separate apportionments” to Facebook’s total revenue stream, “the EMVR is not implicated here.” ADD0061.

At a pretrial hearing, the parties and the district court agreed that the *Daubert* ruling should be certified for interlocutory appeal under 28 U.S.C. § 1292(b). ADD0113; ADD0118–19; ADD0123. The district court therefore certified “the question of the admissibility of plaintiff’s expert report and related testimony on damages” and stayed the case pending this Court’s resolution of the issue. ADD0048.

## ARGUMENT

This Court should grant the petition for permission to appeal. *See Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 206 F. App’x 980, 981 (Fed. Cir. 2006) (unpublished) (exercising discretion to allow appeal).

### **A. The Appeal Satisfies The Standards For Certification Under 28 U.S.C. § 1292(b) And Should Be Heard By This Court.**

The district court’s *Daubert* order is a textbook example of a ruling that satisfies the requirements of § 1292(b). As the district court repeatedly noted, Rembrandt’s entire theory of damages rests on the excluded Malackowski opinion: “It is their sole basis for damages on the basis of reasonable royalty infringement, and that’s a controlling question of law.” ADD0123. In its *Daubert* ruling, for example, the district court found that “Rembrandt’s claim for damages in this case *rests*

*entirely* on the report of its expert, James E. Malackowski.” ADD0057 (emphasis added). The district court reiterated this point in its certification order, noting that “[p]laintiff’s theory of damages in this case *rests solely* on this expert’s report regarding a reasonable royalty.” ADD0047 (emphasis added); *accord* ADD0110 (“the plaintiff put its eggs into that basket, and that’s a basket proven to be faulty”).

Rembrandt suggests that the district court has “left open” whether Rembrandt will be permitted to put on any evidence of damages, Pet. 9, but the district court’s *Daubert* and certification orders belie that possibility. The district court has repeatedly said that the *only* evidence supporting Rembrandt’s damages theory is the Malackowski report, ADD0047; ADD0057, and that Rembrandt will not be allowed to present an alternative theory of damages at trial: “It is clear that allowing [Rembrandt] to craft new theories of damages for presentation at trial, which has long been scheduled to commence in less than two working days, would be manifestly unfair to [Facebook].” ADD0047; *see also* ADD0120 (noting the court’s “very firm view” that Rembrandt will not have a “do-over opportunity”).

This controlling question of admissibility is entirely a product of Rembrandt’s choosing. At the *Daubert* hearing, the district court presaged that Rembrandt’s damages theory was in trouble—yet Rembrandt’s attorney insisted that Rembrandt was committed to the damages theory espoused by Malackowski:

THE COURT: ... I think you would have had your expert maybe do it differently if you had anticipated this, but he didn’t.

ATTORNEY HILLMAN: In all honestly, your Honor, we wouldn't.

THE COURT: Well, good. If I reach a result adverse to you, then you won't -- there won't be any recriminations. You can be happy that you did it as you did it.

ADD0267. As the district court correctly ruled, Rembrandt cannot now be heard to argue that it should be allowed a second bite at the apple. Its damages case therefore stands or falls with Malackowski's opinion.

A ruling by this Court would have an "immediate impact on the course of the litigation" because, as a practical matter, it would determine whether this case can proceed or whether it must end. *Fujitsu Ltd. v. Tellabs, Inc.*, Misc. No. 154, 2013 WL 5098993, at \*1 (Fed. Cir. Sept. 11, 2013) (per curiam).<sup>4</sup> With no viable theory of damages, Rembrandt has no possibility of obtaining the money judgment it seeks. Moreover, as a non-practicing entity that waited for years after the alleged infringement began before asserting the patents-in-suit, Rembrandt would not be entitled to an injunction even if it could somehow prevail on its infringement theories. *See, e.g., Pragmatus AV, LLC v. Facebook, Inc.*, No. 11-cv-494, 2011 WL 4635512, at \*3 (N.D. Cal. Oct. 5, 2011) (observing that non-practicing

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<sup>4</sup> In *Fujitsu*, the panel noted in a non-precedential opinion that "a question regarding the theory on which damages may be recovered cannot be controlling where the issue of liability remains undecided." 2013 WL 5098993, at \*1. Unlike *Fujitsu*, however, this case presents a question concerning the district court's exclusion of the only evidence supporting the sole theory on which Rembrandt, a non-practicing entity, is seeking damages.



patent licensor did not have “a plausible claim to an injunction”). This Court’s affirmance of the district court’s *Daubert* order would thus foreclose Rembrandt’s ability to obtain the relief it seeks and effectively terminate the litigation.<sup>5</sup>

The district court has expressed its intention to proceed to trial if this Court declines to rule on the legal issue in this certified appeal. ADD0123 (noting that if this Court does not accept the appeal, “then we will proceed just as if it were right now”). The parties should not be forced to try this case on the slight chance that the *Daubert* ruling might later be reversed following final judgment. That issue is squarely presented for this Court to decide now, and an affirmance would effectively terminate this litigation. The efficiencies of this appeal could not be more clear, and present exactly the circumstances for which Congress enacted § 1292(b). *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974) (en banc) (noting the aim of § 1292(b)’s drafters in avoiding “wasted protracted trial”).

**B. Rembrandt’s Characterization Of The Legal Issues Is Inaccurate And Incomplete.**

Despite being in agreement with Rembrandt on the need for interlocutory review of the *Daubert* ruling, Facebook wishes to correct several misimpressions

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<sup>5</sup> The district court, to be sure, mused about the possibility of “some kind of remedy,” ADD0110—namely, “nominal” damages, ADD0108—if Rembrandt obtained a judgment of infringement and its patents were not declared invalid (as Facebook contends they should be). *See Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.*, 895 F.2d 1403, 1407 (Fed. Cir. 1990). But Rembrandt is not seeking nominal damages, and has not said it would try this case and risk a declaration of invalidity for the mere possibility of nominal damages.

in Rembrandt’s portrayal of the relevant legal issues.

**1. Rembrandt Challenges Mere Exercises Of Discretion By The District Court That Are Amply Justified On This Record.**

*a. Apportionment.* Rembrandt suggests that district courts are divided on the need to apportion damages beyond the “smallest salable patent-practicing unit.” Pet. 13–15. Here, however, the district court correctly determined that Malackowski “failed to apportion Facebook’s revenue to BigPipe and Audience Symbol—the *features actually causing the alleged infringement.*” ADD0061 (emphasis added).

BigPipe and Audience Symbol are merely improvements added onto the preexisting—and non-infringing—Facebook platform. ““When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance.”” *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1337 (Fed. Cir. 2009) (quoting *Garretson v. Clark*, 111 U.S. 120, 121 (1884)). District courts must “carefully tie proof of damages to the claimed invention’s footprint in the market place,” *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) (per curiam), assessed in light of the “economic relationship between the patented method and non-infringing alternative methods ... [that] would limit the hypothetical negotiation,” *Riles v. Shell Exploration & Prod. Co.*, 298 F.3d 1302, 1312 (Fed. Cir. 2002).

Rembrandt argues that various Facebook web pages infringe the '316 and '362 patents by virtue of the “overall structure and delivery of the page itself.” Pet. 3. It is undisputed, however, that the introduction of BigPipe and Audience Symbol in 2009 is what distinguishes the allegedly infringing versions of Facebook web pages from previously (and currently) existing versions of the same pages that do not infringe. To obtain “a reasonable royalty for the use made of the invention,” 35 U.S.C. § 284, Rembrandt must therefore provide evidence of the *incremental value* that BigPipe and Audience Symbol have allegedly provided to Facebook. *See Garretson*, 111 U.S. at 121 (“The patentee ... must in every case give evidence tending to separate or apportion the defendant’s profits and the patentee’s damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative ....” (internal quotation marks omitted)); *Lucent Techs.*, 580 F.3d at 1337 (quoting same). Facebook, of course, would not have paid a royalty to use features and technologies that predate the alleged infringement.

Rembrandt’s damages expert, in calculating both the royalty base and the royalty rate, made no effort to apportion revenue to the incremental contribution of BigPipe and Audience Symbol. Instead, he simply calculated a supposed reasonable royalty based on Facebook’s entire revenue stream from four features that predate the asserted infringement and numerous additional features that are allegedly

convoyed. ADD0178. To be sure, Facebook currently delivers News Feed, Timeline, Groups, and Photo/Video Sharing through web-based platforms using BigPipe. Yet, each of those features existed well before the use of BigPipe (and thus the alleged infringement) began in 2009, and there is no dispute that Facebook currently provides those features through mobile applications without infringing. *See* ADD0250; ADD0310. The introduction of BigPipe and Audience Symbol could not strip Facebook of its right to use its preexisting and fully-developed technologies or entitle Rembrandt to royalties on the value of those technologies.

Contrary to Rembrandt's suggestion, *see* Pet. 12–13, this Court's decision in *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51 (Fed. Cir. 2012), does not preclude apportionment below the smallest salable patent-practicing unit. *See id.* at 67. Rather, further apportionment is required whenever necessary to satisfy the rule that “if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains.” *Lucent Techs.*, 580 F.3d at 1337 (quoting *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. & Mfg. Co.*, 225 U.S. 604, 614–15 (1912)). Because Rembrandt's damages expert erroneously apportioned revenue to preexisting features of Facebook, his claim that nearly two-thirds of Facebook's revenue is attributable to the patents-in-suit is unreliable and prejudicial. The district court properly exercised its discretion in excluding Malackowski's tes-

timony as to his calculation of both a royalty base and a royalty rate. ADD0064–65.

*b. Surveys.* The district court correctly excluded Malackowski’s opinion for the independent reason that it employs a “suspect and unreliable” methodology to calculate the royalty base. ADD0065–66. Specifically, Malackowski relied on the results of three surveys—two of Facebook users and one of advertisers—taken by other Rembrandt experts. ADD0180. Respondents were asked to rank the “relative importance” of 21 Facebook features as a percentage, *see* ADD0181–83, which Malackowski then averaged across the three surveys, ADD0187. Malackowski then simply assumed that the weighted average is a “proxy” for the percentage of Facebook revenue that each feature generates. *See* ADD0183 (“The weighted percentage of importance of any feature or group of features with respect to the whole set of features is a proxy for the percentage of demand for the whole set of features that is driven by the feature or group of features.”). In this way, Malackowski concluded that an outlandish “65.22% of demand for Facebook is driven by” the allegedly infringing features. ADD0187.

As the district court noted, Malackowski offered no explanation why “the weighted importance of any given feature is exactly equal to the same percentage of advertising revenue.” ADD0065. Indeed, Rembrandt’s own survey expert, Jerry Wind, testified that the survey results could not be used in this manner without

performing “separate analysis” that neither he nor Malackowski ever performed. ADD0372–73 (cautioning that “the link between this [survey] data and the revenue question has to be the subject of a separate analysis”). There is no question that Rembrandt’s experts did not perform this admittedly necessary separate analysis.

Expert testimony must be the product of “reliable principles and methods” to be admissible. Fed. R. Evid. 702(c). Because Malackowski’s calculation of royalty base was “connected to existing data only by the *ipse dixit* of the expert,” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), the district court did not abuse its discretion in excluding Malackowski’s opinions as unreliable.

**2. There Are Substantial Grounds For Difference Of Opinion With Respect To The District Court’s Rejection Of Facebook’s EMVR Argument.**

Separate and apart from the arguments advanced by Rembrandt, the district court incorrectly resolved an important legal question on which there is a substantial ground for difference of opinion: Whether the EMVR applies when a patentee seeks damages based on the entire revenue stream attributed to a particular combination of functions but asserts infringement only as to a subset of those functions. The district court held that the EMVR does not apply in such circumstances, a holding that Facebook contends is legal error. *See Lucent Techs.*, 580 F.3d at 1336 (misapplication of the EMVR constitutes “legal error”).

The only accused infringing technologies in this case are the functionalities

introduced by BigPipe and Audience Symbol. Their implementation in 2009 marks the beginning of Facebook’s alleged infringement; it is undisputed that Facebook did not infringe prior to the introduction of BigPipe and Audience Symbol. *See* ADD0056; ADD0064; ADD0311–12; ADD0315–17; ADD0320–23; ADD0330–31; ADD0361. Both technologies are minor add-ons to various Facebook features, such as News Feed and Timeline, that do not infringe when used independently of BigPipe and Audience Symbol. *See* ADD0062 (noting that “the accused technologies represent a small improvement to an existing technology”). Yet, Malackowski, Rembrandt’s sole damages expert, based his damages estimate on the *entire market value* of Facebook’s advertising revenue from these Facebook features as well as numerous “convoyed” features—necessarily including the revenue associated with the many non-infringing functionalities associated with those features other than BigPipe and Audience Symbol.

This Court has repeatedly held that the EMVR applies (as here) whenever a patentee seeks damages for an accused infringer’s use of a set of multiple components, only part of which is allegedly infringing, based on the total revenues associated with those components. *See LaserDynamics*, 694 F.3d at 67; *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011); *Lucent Techs.*, 580 F.3d at 1336–37. In such circumstances, “the patentee must prove that ‘the patent-related feature is the basis for customer demand.’” *Lucent Techs.*, 580 F.3d at

1336 (quoting *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1549 (Fed. Cir. 1995) (en banc)); accord *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 901 (Fed. Cir. 1986) (“The [EMVR] allows for the recovery of damages based on the value of an entire apparatus containing several features, when the feature patented constitutes the basis for customer demand.”). This rule implements the longstanding principle that a patentee may not obtain royalties based on sales of an entire product when those sales are not “properly and legally attributable to the patented feature.” *Garretson*, 111 U.S. at 121 (internal quotation marks omitted).

The district court held that the EMVR “is not implicated” here because Malackowski “did not use the entire value of Facebook as the royalty base.” ADD0061. The court believed that Malackowski avoided the EMVR by using as his revenue base the revenues allegedly produced by a subset of Facebook’s features—namely, News Feed, Timeline, Groups, Photo/Video Sharing, and the numerous other supposedly convoyed features. *See* ADD0061; *see also* ADD0058 (describing the two separate apportionments of Facebook’s total revenue stream).

The district court’s EMVR holding fundamentally misconceives the logic of the EMVR doctrine, which applies equally whether a patentee bases damages on revenues attributable to an entire multi-component product (only some components of which are alleged to infringe), or revenues attributable to certain features of a product (only some aspects of which are alleged to infringe). Rembrandt seeks a



royalty based on the total revenue stream from certain *features* of Facebook that existed successfully prior to any alleged infringement and continue to be provided successfully to mobile application users without infringing. Only certain *aspects* of those features are alleged to cause the infringement. But Rembrandt has not even attempted to show that those aspects—BigPipe and Audience Symbol—drive advertising demand for the non-infringing features. Applying the logic of the EMVR, Rembrandt therefore cannot, as a matter of law, seek damages based on Facebook’s entire advertising revenue stream from News Feed, Timeline, Groups, Photo/Video Sharing and the allegedly convoyed features.

Although this Court has not applied the EMVR in precisely this context, the logic of its decisions is fully applicable here. As the district court itself noted in discussing Malackowski’s errors in apportionment, allowing Malackowski to calculate damages based on total revenue from non-infringing *features* of Facebook is “a mistake of the same kind as allowing Rembrandt’s expert to use the entire value of Facebook.” ADD0063. It therefore should not matter, for purposes of the EMVR, whether Rembrandt bases its damages calculation on the entire value of Facebook or instead on what it asserts to be the entire value of the Facebook *features* that are not alleged to infringe absent BigPipe and Audience Symbol. In both instances, Rembrandt is seeking damages “far in excess of the contribution of the claimed invention to [the] market,” *Cornell Univ. v. Hewlett-Packard Co.*, 609 F.

Supp. 2d 279, 283–84 (N.D.N.Y. 2009), and the EMVR precludes such relief.<sup>6</sup>

This case presents an excellent vehicle to address this critically important question at this time, given the absence of competing issues that could complicate a post-judgment appeal. Software often operates as a component of a larger suite of features that in turn comprise even larger products, like Facebook or other complex multi-feature offerings. *See Lucent Techs.*, 580 F.3d at 1332. Patentees seeking damages based on alleged infringement caused by particular software add-ons must prove that the particular add-ons drive demand for the entire product; otherwise, damages must be apportioned only to the allegedly infringing add-ons themselves. Allowing the district court’s contrary reasoning to stand would sow confusion, undermine the logic of the EMVR, and create a gaping exception for overreaching patentees to exploit in countless cases involving software and internet patents. This Court should allow this appeal and clarify that the EMVR applies in the software context no less than in other contexts.

## CONCLUSION

For the foregoing reasons, Rembrandt’s petition should be granted.

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<sup>6</sup> Royalty calculations for small components that start with billion-dollar revenues, such as Facebook’s advertising revenue, “skew the damages horizon for the jury, regardless of the contribution of the patented component to this revenue.” *Uniloc*, 632 F.3d at 1320. Such large revenue numbers, divorced from consumer demand, “only serve to make a patentee’s proffered damages amount appear modest by comparison, and to artificially inflate the jury’s damages calculation beyond that which is adequate to compensate for the infringement.” *LaserDynamics*, 694 F.3d at 68 (internal quotation marks omitted).

Respectfully submitted,

Dated: December 26, 2013

/s/ Thomas G. Hungar

Heidi L. Keefe  
Mark R. Weinstein  
COOLEY LLP  
3175 Hanover Street  
Palo Alto, CA 94304

Michael G. Rhodes  
COOLEY LLP  
101 California Street, 5th Floor  
San Francisco, CA 94111

Thomas G. Hungar  
*Principal Attorney*  
Lucas C. Townsend  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036  
Tel: (202) 955-8500  
Fax: (202) 467-0539

*Attorneys for Defendant-Respondent Facebook, Inc.*

## **ADDENDUM**

*Numbering begins with ADD0244.*

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

REMBRANDT SOCIAL MEDIA, LP, )  
 )  
Plaintiff, )  
v. ) CIVIL ACTION  
 )  
FACEBOOK, INCORPORATED, et al., ) 1:13-cv-158  
 )  
Defendant. )  
 )

REPORTER'S TRANSCRIPT

MOTIONS HEARING

Friday, October 11, 2013

BEFORE: THE HONORABLE T.S. ELLIS, III  
Presiding

APPEARANCES: ROBERT HILLMAN, ESQ.  
DANIEL GOPENKO, ESQ.  
Fish & Richardson PC  
1425 K St., NW, Suite 1100  
Washington, DC 20005

For the Plaintiff

HEIDI KEEFE, ESQ.  
ELIZABETH STAMESHKIN, Esq.  
Cooley, LLP  
Reston Town Center, 11951 Freedom Drive  
Reston, VA 20190-5656

For Defendant Facebook

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MICHAEL A. RODRIQUEZ, RPR/CM/RMR  
Official Court Reporter  
USDC, Eastern District of Virginia  
Alexandria Division

1 APPEARANCES (Cont'd):

2  
3 PHILLIP MORTON, ESQ.  
4 Cooley, LLP  
5 Reston Town Center, 11951 Freedom Drive  
6 Reston, VA 20190-5656

7 For Defendant  
8  
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INDEX

RECAPITULATION AND QUESTIONS BY THE COURT

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(Court recessed)

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1 THE CLERK: Civil Action No. 1:13-cv-158,  
2 Rembrandt Social Media, LP versus Facebook, Inc., et al.  
3 Will counsel please identify themselves for  
4 the record.

5 THE COURT: All right. Who's here on behalf  
6 of Rembrandt?

7 ATTORNEY GOPENKO: Good morning, your Honor.  
8 Daniel Gopenko from Fish and Richardson on  
9 behalf of plaintiff. With me today is Mr. Bob Hillman.

10 THE COURT: All right. And who will argue  
11 today?

12 ATTORNEY GOPENKO: Bob.

13 THE COURT: I beg your pardon?

14 ATTORNEY GOPENKO: Mr. Hillman.

15 THE COURT: We don't use first names.

16 ATTORNEY GOPENKO: I apologize.

17 THE COURT: And for the defendant Facebook?

18 ATTORNEY MORTON: Yes. Good morning, your  
19 Honor.

20 Phillip Morton on behalf of Facebook. With  
21 me Ms. Heidi Keefe and Ms. Elizabeth Stameshkin. And  
22 Ms. Keefe will be making the argument today.

23 THE COURT: All right. Thank you.

24 There are two motions to exclude today.  
25 Ms. Keefe, I'll hear from you first with respect to the



1 first motion. Let's take up, first of all, since they  
2 really depend on one another, the motion about  
3 Malackowski's damages. You seek to exclude that on a  
4 number of grounds. And to some extent, that's pivotal  
5 to the second one, isn't it?

6 ATTORNEY KEEFE: I believe -- yes. The  
7 answer is yes, your Honor.

8 THE COURT: All right. Go ahead.

9 ATTORNEY KEEFE: So, your Honor, I actually  
10 have some slides that I passed up, but I prefer usually  
11 just talking to your Honor unless you want me to go  
12 through the --

13 THE COURT: Well, I'll look at the slides.  
14 I'm not -- all right.

15 ATTORNEY KEEFE: What we really have here,  
16 your Honor, is a dispute about the methodology used by  
17 Rembrandt's damages expert, Mr. Malackowski. Here, as  
18 your Honor is aware from the last handful of times that  
19 we've been in front of you, the claims of the patent --

20 THE COURT: Just a handful?

21 ATTORNEY KEEFE: I thought you enjoyed us  
22 being here, your Honor.

23 THE COURT: I -- let's go on.

24 ATTORNEY KEEFE: Thank you, your Honor.

25 THE COURT: Make your assumptions.

1 ATTORNEY KEEFE: Thank you, your Honor.

2 So what we have here is a case regarding a  
3 patent about sending down information from a server to a  
4 user computer so that it can be combined somewhere in a  
5 diary program or a diary applet so that it can  
6 eventually be displayed to a user.

7 In this case, Rembrandt has accused Facebook  
8 technology of infringing its patents. The Facebook  
9 technology that is at issue is the News Feed and/or  
10 Timeline, some other types of display technology. I  
11 think groups and photos are also accused. But only when  
12 they're delivered through BigPipe. BigPipe is what we  
13 talked about a couple of weeks ago. It's the program  
14 that sits between the Facebook server and the user's  
15 browser.

16 Now, in this case, News Feed and Timeline  
17 long predated the BigPipe technology. So Facebook  
18 launched in 2004. In 2004 when Facebook launched,  
19 Facebook had a profiles section. And in the profiles  
20 section, you could actually see what the user -- who  
21 they were and some of the things that they'd done on  
22 their page, and other people could come and look at  
23 that. That technology's existed since Facebook's launch  
24 in 2004.

25 In 2006, Facebook launched a feature called

1 News Feed. News Feed essentially is a feature whereby  
2 the Facebook servers determine what activity of your  
3 friends, of your colleagues might be interesting to you,  
4 and they present it to you so that you can kind of see  
5 what's been going on with all of your friends or your  
6 family. That functionality has been in existence since  
7 2006.

8 Nothing in this case is accused of  
9 infringement until 2009 when BigPipe was added in order  
10 to display the already existing technologies of News  
11 Feed, Timeline, the wall, groups, photos, et cetera.

12 So what we have here is a crystal clear case  
13 of a patent which is basically improving on existing  
14 technology. So News Feed, which predated the 2009  
15 introduction of BigPipe, is only accused of infringing  
16 the patent if it's delivered using the BigPipe  
17 technology.

18 Rembrandt's expert is absolutely clear that  
19 there can be no infringement without the use of BigPipe.  
20 In fact, Facebook still displays News Feed and Timeline,  
21 photos, groups not using BigPipe, on its native mobile  
22 applications. And those aren't being accused either.

23 So what we have here is an improvement  
24 patent, News Feed delivered through BigPipe. Therefore,  
25 according to Federal Circuit precedent, damages must be

1 related to the patented contribution, not to unpatented  
2 features, not to unpatented pieces of technology that  
3 predated the infringing -- the allegedly infringing  
4 technology.

5 However, Mr. Malackowski's entire report  
6 looks to the value of News Feed, to the value of  
7 Timeline to Facebook, not to the value of BigPipe in  
8 delivering News Feed or Timeline.

9 So the fundamental disconnect we have here  
10 is the methodology applied by Mr. Malackowski. He is  
11 not looking to what is the actual contribution of the  
12 patented -- allegedly patented invention and valuing  
13 that for his damages analysis. Instead, he looks solely  
14 to the notion of News Feed and/or Timeline, find some  
15 value attributed to that, and then applies the entire  
16 market value rule to the News Feed or Timeline feature  
17 and says that that's the basis for his damages analysis.

18 We have other problems with the way he then  
19 applies his damage analysis and not showing all of his  
20 homework in terms of the *Georgia-Pacific* factors, et  
21 cetera. But the fundamental flaw, the one that cannot  
22 be overcome in methodology, is that he did not use the  
23 right technology inside of Facebook.

24 THE COURT: Your pages -- go back to the  
25 previous page you showed.

1 ATTORNEY KEEFE: The Timeline?

2 THE COURT: No. I see. Here it is. It was  
3 Page 13.

4 ATTORNEY KEEFE: Yes, your Honor.

5 THE COURT: What does that slide show?

6 ATTORNEY KEEFE: This slide shows all of the  
7 features that Mr. Malackowski looked at on Facebook in  
8 order to try to determine how much damage Facebook would  
9 owe Rembrandt if there was infringement. But nowhere in  
10 this list, nowhere in this list, are BigPipe or audience  
11 symbols, which are the necessary elements that were  
12 added in 2009 to preexisting technologies in order to  
13 round out the infringement scenario.

14 Without BigPipe and audience symbols, there  
15 can be no infringement. It's undisputed that those  
16 weren't added until 2009. It's similarly undisputed  
17 that the remainder of these features can't function  
18 without BigPipe and audience symbols and, in fact, are  
19 not accused independently of infringement.

20 So these are other features that Rembrandt  
21 looks at. Rembrandt also then tries to say that these  
22 features need to be convoyed into the damage analysis  
23 because they work with BigPipe or they work with the  
24 audience symbols. But the truth again here is that all  
25 of these features can and do work without BigPipe and

1 audience symbols, as testified to by their own technical  
2 expert, Dr. Golbeck.

3 So this list here are all of the other  
4 things that their expert actually did analyze. But  
5 again, what's missing, what's critical, where the flaw  
6 is in the methodology is that the contributions of the  
7 patent, BigPipe and audience symbols, are no part of  
8 this chart.

9 THE COURT: All right. You want to address  
10 briefly the problems with the royalty rate?

11 ATTORNEY KEEFE: Absolutely, your Honor.

12 So the problem with the royal rate,  
13 assuming -- even if we assume that you could look to  
14 News Feed as opposed to the smallest infringing piece or  
15 the actual contribution, which is the Bigpipe and  
16 audience symbol, the rate itself has problems.

17 The first problem with the rate is that  
18 Mr. Malackowski used noncomparable licenses as the basis  
19 for starting to figure out what his royalty rate was.  
20 Long before the patents actually issued, there was a  
21 product called zPad. The product, which was put out by  
22 Aduna and licensed to Hink Sport and to a university in  
23 the Netherlands was actually a license to an entire  
24 product.

25 So basically what those people received when

1 they paid 44 cents or one guilder per person was they  
2 received absolute use of an entire product as well as  
3 server storage space, functionality, the ability to talk  
4 to people to make sure the thing was running -- up and  
5 running and working. It was not a naked patent license.

6 So right away, it's a noncomparable license.  
7 It's not economically comparable because it's not for  
8 the same thing. It's not for a naked patent. It's for  
9 a product.

10 THE COURT: He reduced it to 80 percent,  
11 though, didn't he?

12 ATTORNEY KEEFE: He reduces it to  
13 80 percent, but what he says he did in order to reduce  
14 it was he looks to other naked patent licenses that are  
15 completely uncomparable in terms of technology or scope  
16 or anything else.

17 He also does no homework in explaining how  
18 he goes from those product licenses down to the naked  
19 patent license. He doesn't say, "And these are the  
20 elements that I took out because all that's left in the  
21 patent is this one feature," and that's what the naked  
22 patent license would have been for.

23 The analysis isn't complete. He uses a  
24 noncomparable license to a product, and then tries to  
25 right-size it or reduce it using noncomparable licenses

1 from the time period. So what you end up with is  
2 compounded problems. Instead of fixing the problem, he  
3 actually makes it worse because we don't even really  
4 know what the license was that was used to downsize it  
5 or right-size to 80 percent.

6 So right away those licenses are improper  
7 and improperly utilized. The royalty rate itself is  
8 then also -- we have a large problem with the way the  
9 rate is attained. Because as he goes through the  
10 *Georgia-Pacific* factors, almost exactly like the Court  
11 found in the *ePlus* case, we have a listing of  
12 *Georgia-Pacific* factors with simple notations at the  
13 bottom of, "This may have made it higher, "This may have  
14 made it lower" to go from a number in the low single  
15 digits of 1 to 3 percent to suddenly bump it up to 5 to  
16 6 percent with no explanation of how or why each of  
17 those raisings or lowerings were actually tied to any of  
18 the *Georgia-Pacific* analysis. So what the *ePlus* case  
19 tells us is you don't have to --

20 THE COURT: That quote from *ePlus*, am I  
21 supposed to recognize that?

22 ATTORNEY KEEFE: Are you supposed to  
23 recognize *ePlus* or the quote itself?

24 THE COURT: The quote.

25 ATTORNEY KEEFE: The quote itself, let me



1 see which page --

2 THE COURT: The question I am asking is can  
3 you remind me whether that was an opinion I wrote.

4 ATTORNEY KEEFE: It was not. It was Judge  
5 Payne, your Honor.

6 THE COURT: All right. Go on.

7 ATTORNEY KEEFE: It was Judge Payne. This  
8 was a Judge Payne decision in which he found that it  
9 wasn't good enough for the expert to simply say, during  
10 the *Georgia-Pacific* analysis, "I've looked at this, and  
11 I think it goes up. I've looked at this other factor,  
12 and I think it goes down" without explaining in some  
13 fashion how --

14 THE COURT: What does *Joiner* say about that  
15 issue?

16 ATTORNEY KEEFE: It actually --

17 THE COURT: Is that quote from *Joiner* or  
18 is -- is the whole quote from *Joiner* or is it just part  
19 of it? You have quoting *General Electric* against  
20 *Joiner*.

21 ATTORNEY KEEFE: That particular quote --  
22 the one that's on Page 20, that particular quote is from  
23 *Joiner*. And what *Joiner* is saying is that ipse dixit of  
24 an expert, in other words, the expert is simply saying  
25 that it's so without more, without showing your work, is

1 not enough.

2 With the *ePlus* case -- and it did quote --  
3 it did use that quote from *Joiner* -- the remainder of  
4 the *ePlus* case, the facts there were there had been a  
5 number of licenses that the Court found to be  
6 noncomparable that were utilized. And then after that,  
7 in the *Georgia-Pacific* analysis in *ePlus*, there was, I  
8 think, 1 to 3 percent that would have been taken from  
9 the licenses.

10 Then after going through the *Georgia-Pacific*  
11 factors, the expert in the *ePlus* case said, "Well, I  
12 would take Factor 2 and 4 and 6 and it would be neutral.  
13 But with Factors 10 and 13 it would rise, and with the  
14 others it would lower," but didn't say how or why and,  
15 therefore, never kind of showed its homework and then  
16 just ended up with a number of 5 to 6 percent as being  
17 his final opinion.

18 That's very similar to what Mr. Malackowski  
19 did here. Mr. Malackowski lists the *Georgia-Pacific*  
20 factors, but then just says, "Well, I've looked at this  
21 factor and I think it might raise the number. I've  
22 looked at these other factors. It might lower the  
23 number," but then doesn't tie the raising or the  
24 lowering to anything. He just concludes at the end of  
25 that analysis saying, "And based on all that, I find

1 that the rate would be 5 to 6 percent."

2 And so we have a very similar situation  
3 to eSoft -- I'm sorry -- to *ePlus* here where  
4 Mr. Malackowski just didn't do the homework and set it  
5 out for us to understand what the analysis was. And  
6 that's why the quote is there about ipse dixit of an  
7 expert. Because unless the expert actually shows their  
8 homework so that we understand what the analysis is to  
9 rely on it per *Daubert*, if that homework is not shown,  
10 it can't be reasonably relied upon as being reliable.

11 THE COURT: All right. Thank you.

12 ATTORNEY KEEFE: Thank you, your Honor.

13 THE COURT: Mr. Hillman.

14 ATTORNEY HILLMAN: Excuse me. Thank you,  
15 your Honor.

16 I, too, have a slide show here.

17 THE COURT: All right.

18 ATTORNEY HILLMAN: We'll set it up, but it's  
19 sort of a full statement of our case. And I will just,  
20 in the interest of time, jump to basically the two  
21 points that Ms. Keefe dealt with. We can look at the  
22 rest of it if you want or we'll just leave it with you.

23 THE COURT: All right.

24 ATTORNEY HILLMAN: But dealing first with  
25 the -- the issue of should we have been looking at

1 BigPipe and this audience symbol on the privacy level as  
2 the whole focus of the analysis or should we have been  
3 looking at things like Timeline and News Feed.

4 I think the law is clear that it's Timeline  
5 and News Feed and the other infringing elements of  
6 Facebook that are relevant because they are the features  
7 that infringe the claims.

8 THE COURT: That's not what your expert  
9 said. Your expert said that there wouldn't be  
10 infringement without Timeline -- or without BigPipe and  
11 the audience thing, and they've been using these other  
12 things long before this. You don't accuse it then. So  
13 it seems to me that you're changing your tune.

14 ATTORNEY HILLMAN: Well, the thing is, your  
15 Honor --

16 THE COURT: Are you?

17 ATTORNEY HILLMAN: No, I'm not, your Honor.

18 THE COURT: Can you show me where there is  
19 something in this record that says, "We accuse News Feed  
20 and Timeline and video sharing as infringing features"?

21 ATTORNEY HILLMAN: Absolutely, your Honor.

22 THE COURT: Where?

23 ATTORNEY HILLMAN: It's throughout the --

24 THE COURT: Where?

25 ATTORNEY HILLMAN: -- expert reports.

1 THE COURT: Where?

2 ATTORNEY HILLMAN: I don't think that's even  
3 disputed.

4 THE COURT: Yes, it is. It absolutely is.

5 ATTORNEY HILLMAN: What we did not do --  
6 here's the story, your Honor: We agree that prior to  
7 the introduction of BigPipe and the audience symbol, the  
8 earlier versions of Timeline and News Feed did not  
9 infringe. No question about that.

10 THE COURT: Because News Feed and Timeline  
11 and video sharing, video storage don't infringe.

12 ATTORNEY HILLMAN: In their earlier  
13 versions, your Honor.

14 THE COURT: The only thing that makes them  
15 infringe is BigPipe.

16 ATTORNEY HILLMAN: What BigPipe did was to  
17 fundamentally change the way in which Timeline was  
18 delivered.

19 THE COURT: By one second.

20 ATTORNEY HILLMAN: Well, that feature, your  
21 Honor, is referred to by --

22 THE COURT: And your expert didn't even  
23 assess what significance that one feature would have to  
24 the rest.

25 ATTORNEY HILLMAN: Actually, I think he did,

1 your Honor.

2 THE COURT: Really?

3 ATTORNEY HILLMAN: Yes.

4 THE COURT: He did a survey where he didn't  
5 even ask the individual surveyed about that feature.

6 ATTORNEY HILLMAN: But that feature is just  
7 an element of other features. It's not by itself a  
8 feature. It doesn't infringe by itself. And the law is  
9 clear that, you know -- there are two issues here, your  
10 Honor: The first is the apportionment of the total  
11 revenue down to the features that infringe. And the law  
12 is clear that there is no requirement to reduce -- to  
13 continue the apportionment down to things that by  
14 themselves are not infringing.

15 THE COURT: What case do you cite from the  
16 Federal Circuit that you think is most apposite to that  
17 point?

18 ATTORNEY HILLMAN: Okay. It's -- it's right  
19 in here. Let me just jump to that. Excuse me while I  
20 jump into here. So here we are on Slide --

21 THE COURT: This's what you just said. That  
22 doesn't give me any Federal Circuit case that says that.

23 ATTORNEY HILLMAN: I'm in my wind-up, your  
24 Honor.

25 THE COURT: Let's pitch. Never mind the

1 wind-up. Pitch.

2 ATTORNEY HILLMAN: Here's the pitch. It's  
3 on Slide 15. "The patentee must in every case give  
4 evidence tending to separate or apportion the profits  
5 between the patented feature and the unpatented  
6 features."

7 THE COURT: All right. That's something  
8 that Ms. Keefe says absolutely. That's why she's here.

9 MR. HILLMAN: Right. But the patented  
10 feature, your Honor, is Timeline once BigPipe was  
11 introduced --

12 THE COURT: Well, that's the debate between  
13 you two. You say that's the patented feature; she says  
14 that the record indicates the contrary. So that's the  
15 decision I have to make.

16 ATTORNEY HILLMAN: That's right, your Honor.

17 THE COURT: All right. I'm ready to make  
18 it.

19 ATTORNEY HILLMAN: Well, could I finish a  
20 little more on this?

21 THE COURT: Yes. I didn't say I'm ready to  
22 make it one way or the other, but I'm certainly ready to  
23 make it. I've heard a good deal about it.

24 ATTORNEY HILLMAN: Here's my next case:  
25 Let's look down at *Laser Dynamics* again on Page 15. "It

1 is generally required that the royalties be based not on  
2 the entire product, but instead on the smallest saleable  
3 patent practicing unit."

4 Now, BigPipe by itself is not a patent  
5 practicing unit. It's only an element of Timeline -- of  
6 the new version of Timeline and News Feed, which are the  
7 patent practicing unit.

8 THE COURT: The only thing new about  
9 Timeline and News Feed is BigPipe. It's the delivery of  
10 it.

11 ATTORNEY HILLMAN: Well, let's take a look  
12 at --

13 THE COURT: Is that right or wrong?

14 ATTORNEY HILLMAN: It's not a situation --

15 THE COURT: Is that right or wrong? You  
16 have to answer my question.

17 ATTORNEY HILLMAN: I would say --

18 THE COURT: Otherwise, we're -- it's futile  
19 for me to sit here.

20 ATTORNEY HILLMAN: I would say it's not  
21 right, your Honor.

22 THE COURT: Why not?

23 ATTORNEY HILLMAN: Because it's not a  
24 situation where you had an existing thing, and then you  
25 just added an element to it and left the rest of it --



1 THE COURT: It did have News Feed and  
2 Timeline before.

3 ATTORNEY HILLMAN: Right. But what  
4 happened -- if you take a look at the claims of the  
5 patent and apply them to News Feed, you see that none of  
6 the elements that were in the old Timeline are any  
7 longer present. The whole operation of News Feed, one  
8 element of which is BigPipe, is the elements of the  
9 claim. And I've got a slide here that makes that point.  
10 It's Slide 11. We're going backward here.

11 So here's what Timeline looked like after --  
12 starting in 2009. And none of this operation is the  
13 same as it was in the old Timeline. So let's take step  
14 by step. At the top here, the diary server is sending  
15 the diary program, which includes BigPipe, down to the  
16 user system. So that feature was new.

17 The second step, three different things are  
18 sent down to BigPipe: The content data, the page  
19 design, and privacy level information. None of that  
20 happened in the old Timeline. What happened in the old  
21 Timeline is that the whole thing was set up at the  
22 server and simply sent down. There was no sending  
23 individually of content, of page design, and the privacy  
24 level information.

25 And then the assembly step. There was

1 nothing to assemble in the old Timeline. So that's a  
2 brand-new step. Then the last two here are the steps  
3 taken to update or to change the content or the design,  
4 and none of that was true, also.

5 Composer, which you'll remember from the  
6 last hearing is also part of the diary program even  
7 though it wasn't relevant to the summary judgment  
8 discussion. That sends a request back to the server,  
9 and then in the final step the server sends new stuff  
10 down.

11 So all of that is new, and that's the new  
12 Timeline. Now, it's true that that didn't happen until  
13 BigPipe was introduced and until the audience symbol was  
14 introduced. But those two steps together are now  
15 fundamental to the new version of Timeline and the new  
16 version of News Feed.

17 And so then the question is, well, how  
18 important are these? Are these just trivial little  
19 things? Well, we'd say that Malackowski did consider  
20 the value of BigPipe and audience symbol in Slide 17.  
21 And, you know, we've got a bunch of quotes here  
22 explaining where he did it, how the speed was  
23 introduced -- was increased with the BigPipe technology.  
24 And the transparently -- transparency and intuitiveness  
25 of the privacy settings were improved with the audience

1 symbols.

2 And he cited in his report -- this is the  
3 original report -- the support for that. And this is --  
4 these are some quotes from Facebook's own document that  
5 cites speed as one of the most critical company goals  
6 for Facebook.

7 "In 2009, we successfully made Facebook's  
8 site twice as fast. One of the secret weapons that we  
9 use to do this is called BigPipe." And then you've got  
10 this graph in here.

11 So that was a big deal. You can say, "Okay,  
12 it's just a second." But the reality is that the people  
13 at Facebook thought it was a very big deal, that it was  
14 a secret weapon.

15 And he, Malackowski, further cited and  
16 relied on the Golbeck report as to the importance of  
17 BigPipe and the audience symbol. And, you know, here  
18 we've have got some quotes from Golbeck that basically  
19 were incorporated by Malackowski into his report. So --

20 THE COURT: How could this fellow think that  
21 BigPipe was so important and then ignore it in his  
22 rankings, ignore it in his survey.

23 ATTORNEY HILLMAN: Because it's just an  
24 element of the things he did.

25 THE COURT: Well, that's what I have to

1 decide whether that makes a hill of beans or not.

2 ATTORNEY HILLMAN: Right.

3 THE COURT: I think what's happening is what  
4 happens in a lot of cases. I used to do it. I used to  
5 do what you're doing. That is there's a litigation.  
6 You plan, and then there are things that happen, and  
7 then you have to adjust to it and you have to do things  
8 to adjust to the situation raised by the other side.  
9 And I have to decide whether that's really valid or not.  
10 And that's -- you're pointing out I think you would have  
11 had your expert maybe do it differently if you had  
12 anticipated this, but he didn't.

13 ATTORNEY HILLMAN: In all honestly, your  
14 Honor, we wouldn't.

15 THE COURT: Well, good. If I reach a result  
16 adverse to you, then you won't -- there won't be any  
17 recriminations. You can be happy that you did it as you  
18 did it.

19 ATTORNEY HILLMAN: Here's the thing, your  
20 Honor: Let's take BigPipe. The average user -- the  
21 user doesn't know whether BigPipe is there or not. The  
22 other side did these --

23 THE COURT: It doesn't matter what the  
24 user -- the user is interpreted in speed, but he only  
25 gets a second, and that's not a big deal.

1 ATTORNEY HILLMAN: Facebook says it is a big  
2 deal.

3 THE COURT: Well, all right. Go on.

4 ATTORNEY HILLMAN: Well, that's a disputed  
5 fact, your Honor. But --

6 THE COURT: We're not talking about disputed  
7 facts today. We're talking about whether I think that  
8 your expert's opinion is firmly based on reasonable  
9 evidence and reliable, whether it's reliable.

10 ATTORNEY HILLMAN: And our position, your  
11 Honor, is that our expert had the right to rely on  
12 Facebook's statements about the importance of BigPipe.  
13 They called --

14 THE COURT: He has a right to rely on  
15 anything he wants to. What matters is whether I think  
16 that reliance is entitled to any deference at all.

17 ATTORNEY HILLMAN: Well --

18 THE COURT: If it's one second, then he  
19 says, "Oh, but they say it's a big deal," he ought to  
20 look at the substance, not some puffing statements.

21 ATTORNEY HILLMAN: I would still submit,  
22 your Honor, that whether this is a puffing statement or  
23 whether it's substance is a matter that ought to be  
24 decided at trial, not at this stage of the game. Here  
25 we've got --

1 THE COURT: I'm deciding at this stage of  
2 the game whether your expert's opinion is reliable in  
3 its methodology. I act as a gatekeeper. This isn't a  
4 jury issue.

5 Go ahead. I'll listen further.

6 ATTORNEY HILLMAN: Let me -- let me -- let  
7 me go to the rate issue.

8 THE COURT: All right. Before you do that,  
9 though, I want to be sure I understand your argument.

10 You say that -- Ms. Keefe says, "Look, the  
11 Timeline and the video sharing and News Feed were not  
12 accused features." Your argument is that it's a new  
13 situation when you add BigPipe and that they are now  
14 accused.

15 Is that what you're saying.

16 ATTORNEY HILLMAN: That's correct, your  
17 Honor. And they are the smallest possible infringing  
18 feature or patent practicing feature, which is what --

19 THE COURT: They have the what? I'm sorry?

20 ATTORNEY HILLMAN: News Feed and Timeline in  
21 their new versions are the smallest patent practicing  
22 units of the system.

23 THE COURT: All right.

24 ATTORNEY HILLMAN: And what we say -- and  
25 that's why I read to you from *Unilock* and *Laser*

1       Dynamics -- is that the Federal Circuit requires that  
2       you allocate down to the smallest patent practicing  
3       unit. There is no case that we know of that says that  
4       you have to allocate for the purposes of setting the  
5       base down below that into an element of the patent  
6       practicing unit that is not itself an infringement or  
7       patent practicing. And that's our position on the law.

8               THE COURT: Let me hear Ms. Keefe's response  
9       to that, then you can come back and address royalty rate  
10      in a few minutes.

11             ATTORNEY KEEFE: Happy to, your Honor.

12             The first thing I take extreme exception  
13      with is this isn't a new version of News Feed. BigPipe  
14      is a delivery mechanism. News Feed hasn't changed.  
15      This isn't a new version of News Feed. This is News  
16      Feed being delivered through BigPipe instead of not  
17      through BigPipe.

18             News Feed is also not being accused as it  
19      exists today when it's delivered to a native mobile  
20      application. So this isn't that there are now --

21             THE COURT: What is your answer to his  
22      argument that Federal Circuit precedent does not require  
23      allocating down to the BigPipe level.

24             ATTORNEY KEEFE: I disagree completely. If  
25      we look at, for example, the *Lucent* case, *Unilock*, *Shell*

1 vs. *Reilly*, in the *Lucent* case, what we had was the  
2 Microsoft Outlook had a feature called datepicker. Now,  
3 datepicker didn't work all by itself. Datepicker didn't  
4 infringe alone. It infringed as part of Microsoft  
5 Outlook. It was a feature whereby the system would pop  
6 up a window where you could actually cut and past in the  
7 dates that you wanted to choose out of the calendar.  
8 The claims required you to be able to do this in a  
9 larger system.

10 So just -- Mr. Hillman's arguing that  
11 because BigPipe can't infringe all by itself, it has to  
12 be with other things, that somehow means that we don't  
13 go down to the smallest unit.

14 The Court in *Lucent* found that even though  
15 datepicker itself may not have infringed alone or didn't  
16 work alone, it had to be a part of Outlook, that you  
17 couldn't use Outlook as the product that you were  
18 evaluating in terms of value for the base.

19 Instead, they rejected the argument of using  
20 all of Outlook and said, "You have to go down to whether  
21 or not there is value in datepicker and whether or not  
22 users would have bought Microsoft Office or Outlook just  
23 for the datepicker function." That's what we're saying  
24 is happening here.

25 THE COURT: Address the case, though, that



1 Mr. Hillman just mentioned where he says you don't have  
2 to go down --

3 What was the term you used?

4 ATTORNEY HILLMAN: Beyond the smallest  
5 patent practicing unit.

6 THE COURT: There you are.

7 And what was the name of the case,  
8 Mr. Hillman?

9 ATTORNEY HILLMAN: Well, it was *Laser*  
10 *Dynamics*.

11 ATTORNEY KEEFE: And in *Laser Dynamics*, the  
12 exact type of thing happened that's happening here, your  
13 Honor. In *Laser Dynamics*, what we had was a case of an  
14 optical disc drive being put into a larger laptop. The  
15 optical disc drive was -- it's the thing that popped out  
16 of the side of your computer. You put a CD or DVD into  
17 it, shut it, and then the computer runs using that disc.

18 The patent in that case was about an  
19 automatic feature whereby the laptop and the drive  
20 itself would read to see whether or not the CD --  
21 sorry -- the disc that had been put in was a DVD or a  
22 CD.

23 In that case, the plaintiff had attempted to  
24 say that they deserved royalties on the entire laptop  
25 because it worked in conjunction with the laptop. That

1 disc drive didn't work unless it was put into the  
2 laptop.

3 So there was no only down to one piece that  
4 was the tiniest little part that was infringing because  
5 it was part of the sum total the same exact way that we  
6 have here. However, in that case, the Court rejected  
7 the notion that the laptop be used as the royalty base  
8 and instead said you had to go down to the actual  
9 patented contribution. And there the patented  
10 contribution was this automated software being run on  
11 just the optical disc drive, just like here.

12 We may have News Feed, but the only patented  
13 contribution to it is a delivery through BigPipe.  
14 Therefore, all of the case law says that you have to  
15 look to the patented contribution, that smallest  
16 saleable unit, whether or not it could be sold  
17 independent or by itself.

18 The *Unilock* case, same idea. In the *Unilock*  
19 case, the plaintiff was trying to accuse Microsoft of  
20 infringing by use of product activation, which was a  
21 code that you had to type in before you could access the  
22 Microsoft products like Windows or Office. And the  
23 plaintiff said that they deserved, therefore, a share of  
24 every single thing that Microsoft had ever sold because  
25 you couldn't even use the products without having

1 infringed the product activation claims.

2 What the Court said there was, "No, you  
3 can't look to the whole thing. You have to look to just  
4 the patented contribution," which in that case was  
5 product activation. Product activation couldn't even be  
6 used by itself.

7 So what the Court said, though, was, "It  
8 doesn't matter. That's the smallest contribution being  
9 made by this patent."

10 And last but not least, we cited in our  
11 brief the *Shell versus Reilly* case. That's a case just  
12 like here where you had a preexisting thing. There they  
13 were oil rigs, the same way that I would say News Feed  
14 or Timeline preexisted. In that case, the plaintiff  
15 tried to get royalties and damages off of the entire oil  
16 rig saying that unless they used their mud mat -- that  
17 was the patented improvement there -- unless you use the  
18 mud mat to put the rig into place -- the mud mats were  
19 basically a way of making sure that the pylons that the  
20 oil rig uses to go down into the ground were more  
21 stable.

22 And the Court said, "No, you don't get to  
23 look to the whole rig. You have to look to the patented  
24 contribution." Even though when you put the mud mat in  
25 with the rig, it all works together in one fashion. And

1 the mud mats wouldn't work without the rig because they  
2 have to be used in order to establish the rig.

3 So I disagree with Mr. Hillman's reading of  
4 those cases to now say that you can't go down to the  
5 BigPipe portion. Instead, every case coming out of the  
6 Federal Circuit right now is absolutely clear it's just  
7 the opposite. They're saying you don't look to the  
8 whole product that's being accused. You look to the  
9 patented contribution.

10 THE COURT: He doesn't dispute that. It's  
11 how far down you go, is what he disputes.

12 ATTORNEY KEEFE: And what I'm saying here is  
13 that you have to go down to the patented contribution.  
14 And that is exactly what happened in *Lucent* when they  
15 went down to the datepicker function. It's what  
16 happened in *Unilock* when they went down to product  
17 activation function. It's what happened in *Shell* when  
18 they went down to the mud mats.

19 I could go on, but that's exactly why the  
20 case law supports it. We're saying you have to go down  
21 to the patented contribution, which in this case is  
22 BigPipe and/or the audience symbol.

23 THE COURT: Mr. Hillman, you want to go on  
24 to royalty now.

25 ATTORNEY HILLMAN: Actually, I need to

1 respond to that because we have --

2 THE COURT: She gets the last word on  
3 anything that's said. So -- and at some point, as a  
4 concession to the shortness of life, we have to end it.  
5 You've had briefs and everything. But -- I do want you  
6 to respond, but make it succinct.

7 ATTORNEY HILLMAN: Very well. I'll talk  
8 about just one of those cases, *Laser Dynamics*.

9 THE COURT: All right.

10 ATTORNEY HILLMAN: And I think that case  
11 proves my point. The smallest patent practicing unit in  
12 that case was the disc drive. Now, the plaintiff there  
13 improperly tried to claim royalties on the whole laptop.  
14 And what the Court said was, "No, the most you can do is  
15 on the disc drive itself."

16 But the interesting thing is that when you  
17 looked into what the real technological contribution  
18 was, it was only a little feature of the disc drive. It  
19 was the ability of the disc drive to detect what kind  
20 of disc is being put in to be played. That was the new  
21 thing.

22 Disc drives themselves had existed a long  
23 time by that point. But the Court did not require the  
24 allocation or the apportionment to go down to the value  
25 of that one little feature.

1 THE COURT: All right.

2 ATTORNEY HILLMAN: It's clear from the  
3 opinion that it was sufficient to get it down to the  
4 disc drive as a whole because that was what infringed.  
5 If you went beyond that, it didn't infringe.

6 THE COURT: Let's give Ms. Keefe the last  
7 word on that, and then we'll go on to give you an  
8 opportunity to respond to her royalty argument, then  
9 she'll have the last word on that.

10 Ms. Keefe.

11 ATTORNEY KEEFE: In that case, your Honor,  
12 if you look, the studies that were done in that case  
13 were directed to the patented contribution, and then  
14 used the disc drive itself. Here there's been no study  
15 of the patented contribution in one way, shape, or form.  
16 There's nothing that Mr. Malackowski said anywhere in  
17 his report about whether or not there's value in BigPipe  
18 or audience symbol, and that's all throughout our  
19 briefs.

20 THE COURT: All right. Now let's go to  
21 royalty.

22 ATTORNEY HILLMAN: Let's see. Let me jump  
23 in our slides to that slide. I believe it's Slide 40.  
24 Actually, let's -- I think we can just look at one slide  
25 here, your Honor. I can make my point in connection

1 with this. That would be Slide 45.

2 And so this sort of graphically illustrates  
3 the analysis that Mr. Malackowski went through. First  
4 of all, he took the Aduna licenses themselves that had  
5 happened before the patent even issued, and they were  
6 software licenses. And technologically, they were, you  
7 know, completely comparable because it was the exact  
8 same system that now covered by the patent claims.

9 He recognized that economically, there was a  
10 big difference. They were software licenses, and the  
11 hypothetical negotiation is a patent license. And so he  
12 undertook to make a conversion between the software  
13 license and what would have been the patent license if  
14 there had been a patent at that time.

15 And he used some publicly available  
16 information about other kinds of software license  
17 agreements to come up with a conversion factor of  
18 20 percent or 80 percent, depending on which way you  
19 look at it. And he then converted that to what would  
20 have been a royalty rate if it had been a patent  
21 license. And he used that as a lower end of this range.  
22 That's the 2.3 percent on the slide.

23 And then he looked at the total profit  
24 margin that was attributable after his apportionment to  
25 the patented and convoyed features. And he said, "Well,

1 that's the total amount of profit that needs to be split  
2 in some way between the parties in the hypothetical  
3 negotiation. And he called that his upper bound, which  
4 is the 21.99 percent.

5 And then he made other calculations. He  
6 looked at what would the profit have been on just the  
7 Timeline, NewsFeed, and the other two directly  
8 infringing features without the convoyed features. And  
9 that would have been 6.66 percent.

10 And then based on that and the  
11 *Georgia-Pacific* factors, he came up with his 5 or  
12 6 percent. It's not something that he just pulled out  
13 of the air. But if you notice, it's very similar --  
14 it's just a little bit below what the profit margin  
15 would have been on just the directly infringing  
16 features, the 6.66. It's not unreasonable to say that  
17 in a negotiation, the parties might well have  
18 compromised, you know, in the middle there some slightly  
19 below that 6.6 percent.

20 But beyond all that, he did something else.  
21 In connection with the *Georgia-Pacific* factors, in  
22 particular Factor 11, which is the value of the patented  
23 technology, he concluded that that was very strong. And  
24 again, admittedly this gets into our debate about he's  
25 entitled to rely on Timeline and News Feed in their new



1 form or not, but he even went beyond that.

2 He looked at a couple of other situations  
3 outside of the context of the *Georgia-Pacific*. He  
4 looked at two transactions that Facebook had undertaken.  
5 One of them was a settlement with a company called  
6 Summit 6, which is a company that had improvement  
7 technology on uploading photos into Timeline, and they  
8 paid \$20 million for that technology -- to settle that  
9 patent case.

10 And Mr. Malackowski -- and this is -- I'm  
11 talking about Pages 110 and 111 of his report. He then  
12 said, "Okay. Well, that 20 million was just for a photo  
13 feature where the features in this case were much more  
14 pervasive of the system extending into Timeline and News  
15 Feed, which Zuckerberg calls the pillars of the whole  
16 Facebook system. And so he scaled that up to a number  
17 that, at a minimum, was 196 million.

18 And so he then looked at the acquisition of  
19 Instagram, another company that had some technology  
20 having to do with photos. And in the publicly available  
21 papers, Facebook assigns a value to that technology  
22 itself of \$74 million. And so Mr. Malackowski undertook  
23 a similar scale-up because that was just photos, and  
24 this is more pervasive. And he came up with something  
25 over \$700 million.

1           So we're not saying that those are the right  
2 numbers, but those were sanity checks to show that based  
3 on the facts of this case, it was not unreasonable for  
4 him to come up with a number of 5 or 6 percent. That's  
5 totally different than what happened in the *ePlus* case.

6           THE COURT: I don't think you really mean to  
7 argue not unreasonable.

8           ATTORNEY HILLMAN: No, I don't. I'm being  
9 too deferential here.

10           THE COURT: The fact of the matter is --and  
11 I might even point this out -- when you earlier said,  
12 "Look, it's a jury issue about whether this is fast" or  
13 whatever, this isn't a jury issue. The whole point of  
14 my sitting as a gatekeeper is to prevent things that are  
15 unreliable and irrelevant from getting to a jury.  
16 Because we all know that juries sometimes just accept  
17 without any reflection what an expert says.

18           So it's very clear, under *Joiner* and *Daubert*  
19 and all the cases, that district judges have to engage  
20 the technology, and they have to decide whether the  
21 methodology used is reliable. It's certainly relevant  
22 to consider what the reasonable royalty might be, but  
23 then I have to consider whether it's a reliable  
24 methodology. Therefore, appeals to what a jury might  
25 find is kind of out of place in *Daubert*. And I wanted

1 to make that point.

2 ATTORNEY HILLMAN: I totally degree with  
3 that, your Honor. The one caveat I would offer, with  
4 due respect, is that there's a fine line between  
5 reliability and then a disputed point that, you know --

6 THE COURT: No one disputes that it's one  
7 second.

8 ATTORNEY HILLMAN: Yes.

9 THE COURT: That's the fact. Now, just  
10 because they may hawk it as something blindingly fast  
11 or, you know, it would improve it by a hundred percent  
12 or something like that is not reliable. What's reliable  
13 is the fact that no one disputes it's one second.

14 But let's get back to royalty because that's  
15 what you're addressing now. And I think what you  
16 intended to argue is not that it's not unreasonable for  
17 him to conclude that it was between 5 and 6 percent, but  
18 that it's eminently reasonable for him to make that  
19 conclusion given the predicates that he addressed.

20 ATTORNEY HILLMAN: That's correct, your  
21 Honor. I appreciate you correcting me on that.

22 THE COURT: If I degree with you, then the  
23 matter simply goes forward. If I don't agree with you  
24 on any of these things, what happens? Let's say I don't  
25 agree with you with respect to, oh -- let's say I agree

1 with you on the point you made about going down to the  
2 lowest patented unit, but I disagree with you on royalty  
3 rate, what happens then?

4 I mean, the problem is that you don't get  
5 to -- you don't get to redo all of your experts and go  
6 back through discovery. That would exclude the  
7 testimony, wouldn't it, either one?

8 ATTORNEY HILLMAN: I think courts have gone  
9 both ways on that, your Honor.

10 THE COURT: Well, all right.

11 All right. Are you done with royalty?

12 ATTORNEY HILLMAN: I am, your Honor.

13 THE COURT: Ms. Keefe, royalty.

14 ATTORNEY KEEFE: Thank you, your Honor.

15 Very briefly.

16 THE COURT: Would you address this last  
17 point I raised. Let's suppose I agree with you on one  
18 of these. I don't have to reach even the other one, do  
19 I?

20 ATTORNEY KEEFE: That's correct, your Honor.  
21 Once the testimony is excluded, one way or the other,  
22 there's no testimony left to have.

23 THE COURT: All right. And then we would  
24 take up Mr. Hillman's point that he thinks he should  
25 then have a chance to repair it and to have new

1 discovery.

2 ATTORNEY KEEFE: And I would argue deeply,  
3 your Honor, that that simply shouldn't be the case. We  
4 have a tight schedule in this case for a reason. We are  
5 trying to get --

6 THE COURT: All right. Well, we don't -- he  
7 says some cases allow it; and some cases don't. I don't  
8 need to hear about that now.

9 ATTORNEY KEEFE: Thank you, your Honor.

10 THE COURT: All right. Go back to royalty.

11 ATTORNEY KEEFE: Just very briefly, your  
12 Honor, in fact, even looking at the slide that  
13 Mr. Hillman was just using, one of the other problems  
14 that I didn't address in the very beginning is the  
15 number that we have. I addressed why I think there are  
16 problems with the Aduna licenses and those issues.

17 On the 21.99 percent upper bound, one of the  
18 biggest problems with that upper bound is that  
19 Mr. Malackowski, using the what we call improper  
20 surveys, finding out that News Feed was important to  
21 users, that various features of Facebook were important,  
22 he then translated those directly to the exact  
23 percentage of revenue that Facebook would have achieved  
24 because of what users deemed important in these surveys,  
25 and he used that to come up with this upper bounded

1 21.99 number. So that has unreliable come out.

2 The middle factor is the one that I was  
3 walking about that goes directly to the *ePlus* case. And  
4 if I could point your Honor to almost all of Page 815 of  
5 that *ePlus* case, Mr. Hillman's middle bar where there's  
6 simply some red arrows down and green arrows up is  
7 exactly why we have such a problem with  
8 Mr. Malackowski's rate.

9 In *ePlus*, we're told that you cannot simply  
10 give, and I quote, "unarticulated quantum of higher  
11 royalty rate." The case goes on to say, "He," meaning  
12 that expert, "articulated as well that he had considered  
13 each of the factors in the cumulative relative rate and  
14 then stated that the reasonable royalty rate, which the  
15 hypothetical negotiation would produce here, would be in  
16 the range of 5 to 6 percent without explaining at all  
17 how it was that the application of any one or all of  
18 those factors would permit an increase of the base  
19 royalty rate of approximately 100 percent." Just like  
20 here, from 2.3 percent up to 5 to 6 percent, it's simply  
21 not explained.

22 So we submit that the *ePlus* case controls  
23 here because there is no explanation. He didn't show  
24 his homework.

25 THE COURT: It doesn't control. It's not

1 controlling.

2 ATTORNEY KEEFE: I apologize. It is very  
3 instructive, your Honor.

4 THE COURT: All right.

5 ATTORNEY KEEFE: Unless your Honor had any  
6 further questions, I think that's it.

7 THE COURT: All right.

8 ATTORNEY KEEFE: I'm sorry. I did have one  
9 other thing.

10 On the two other things that Mr. Malackowski  
11 claims to have looked at, the *Summit 6* settlement, that  
12 was a settlement on eve of trial. Cases like RescueNet  
13 have told us to be very leery of those and to give them  
14 limited weight. So I'm not sure why that justifies any  
15 type of an upper bound or an upper range.

16 Nor did Mr. Malackowski ever explain whether  
17 or not photos are actually incredibly important to  
18 Facebook and a very large part of what Facebook does.  
19 So simply saying that he thought that photos were only  
20 one out of a dozens of features, he didn't test whether  
21 or not photos were actually the most important feature.

22 THE COURT: One of the problems with these  
23 reasonable royalty rate cases is that one side says:  
24 "Well, I look this, this, and this, and my judgment is  
25 it's this."

1 And the other side says, "No, there's no  
2 articulable reason why you reached that judgment."

3 Well, there are always judgments. They're  
4 judgments, and typically made by people who have  
5 advanced degrees, but have never negotiated a license.  
6 It's odd that we have such a system. I don't know why  
7 it is.

8 But one of the problems with your argument  
9 that there isn't enough analysis about why it's  
10 21 percent or why he used the percentages for News -- to  
11 translate directly, those are judgments. And  
12 ultimately, that's what this is all about. It's a  
13 judgment. I don't remember Malackowski's, but I'm sure  
14 he has graduate degrees.

15 Is he an economist or what is he,  
16 Mr. Hillman?

17 ATTORNEY HILLMAN: He's an economist.

18 THE COURT: Economist who's probably never  
19 worked a day in his life in the real world.

20 ATTORNEY HILLMAN: Actually, he has. He was  
21 in a company -- not any longer -- that valued and  
22 auctioned off technology.

23 THE COURT: So that gives him some leg up.  
24 Most experts don't even have that, especially the  
25 economists. Anyway, whatever role he might have played



1 in that is another matter.

2 We used to have a saying for that. Most of  
3 the people we heard from when I served in the Navy would  
4 say a lot of things about what we did, but had no time  
5 in the cockpit. And the people who had a lot of time in  
6 the cockpit are usually not very vocal.

7 All right. Do you want to say anything  
8 further about that? I think we should go on now to the  
9 issue of the other --

10 ATTORNEY KEEFE: The technical expert?

11 THE COURT: Is this the -- Golbeck?

12 ATTORNEY KEEFE: Yes, your Honor.

13 THE COURT: All right.

14 ATTORNEY KEEFE: So this one, I believe, is  
15 quite a bit shorter, your Honor. With respect to the  
16 first problem that we have with Dr. Golbeck's testimony,  
17 it all revolves around her use -- or rather her nonuse  
18 of your Honor's construction for privacy level  
19 information. Your Honor provided a claim  
20 construction for privacy --

21 THE COURT: I have it in front of me. Now,  
22 she said, I think, that it is a rule indicating the  
23 metes and bounds of who has permission to view  
24 particular content and -- what's the -- what is the  
25 exact problem?

1                   ATTORNEY KEEFE: The exact problem, your  
2 Honor, is she's narrowing your Honor's definition. The  
3 definition your Honor provided maintains that privacy  
4 level information includes information that simply  
5 describes which user is permitted to view the content.  
6 It doesn't act as a rule which prohibits or mandates  
7 that someone not see it or prohibits a specific person  
8 from doing something one way or the other. It doesn't  
9 set out metes and bounds and act as a rule which  
10 precludes or prohibits something from happening. The  
11 definition given by your Honor is broad enough to  
12 include information that simply describes which user is  
13 permitted to view the content. Whether or not they  
14 actually can, whether or not they do is not part of the  
15 definition.

16                   And yet when in deposition and describing  
17 exactly how she was applying the term "privacy level  
18 information," she said it had to have these metes and  
19 bounds and had to actually prohibit or preclude someone  
20 from viewing the information.

21                   So we maintain that she was not using your  
22 Honor's definition, but a narrowed version that they had  
23 been trying -- they are trying to use in order to  
24 overcome prior art. That's as simple as the issue is  
25 for that.

1 THE COURT: What's the prior art?

2 ATTORNEY KEEFE: The prior art in this  
3 particular instance has to do with the Nazim reference,  
4 which is the way that Yahoo functioned at that time.  
5 The way that Yahoo functioned at the time, you actually  
6 could see who had access to the information, but there  
7 wasn't a specific rule delineating that someone cannot  
8 absolutely -- like actually act as a bar from showing  
9 somebody information.

10 Instead, you knew who was viewing the  
11 information. You knew the identity of the user whose  
12 page is being viewed. And so you knew who was actually  
13 able to view the content, like your Honor's construction  
14 of -- describes which user is permitted to view the  
15 content.

16 THE COURT: What's the difference between  
17 that and metes and bounds of who has permission to view  
18 the content?

19 ATTORNEY KEEFE: It's more the notion that  
20 she calls it a rule and the fact that she maintains that  
21 it has to be a rule which sets out exactly who can do  
22 this instead of merely describing who's been identified  
23 as someone who can do it. So she's trying to narrow  
24 down the definition to a rule instead of a mere  
25 description you what can happen.

1 THE COURT: How does that relate to this  
2 issue about whether the prior art is -- not anticipates,  
3 I guess. It would be that renders it obvious or  
4 unobvious.

5 ATTORNEY KEEFE: Her argument seems to be  
6 that Nazim doesn't have privacy level information  
7 because there is no rule precluding someone else from  
8 looking at the page. That there's no code in My Yahoo  
9 that actually says, "And only this person can view this  
10 that's being pointed at."

11 Instead what we showed and what we asked  
12 Dr. Golbeck about was the fact that the My Yahoo page  
13 that is displayed to a user definitely does show that  
14 it's unique to that user and it's going to depend on  
15 that one and only user. And that meets your Honor's  
16 definition of privacy level information. She argues it  
17 doesn't because there wasn't a rule setting out who  
18 could see it or who could not; in other words,  
19 prohibiting anyone from seeing it.

20 THE COURT: Mr. Hillman.

21 ATTORNEY KEEFE: There are two other small  
22 problems we have with --

23 THE COURT: Go ahead. Yes. I'm sorry.

24 ATTORNEY KEEFE: They're very short, your  
25 Honor.

1 On the second issue, Dr. Golbeck --

2 THE COURT: This is combining prior art?

3 ATTORNEY KEEFE: Correct.

4 THE COURT: All right.

5 ATTORNEY KEEFE: And Dr. Golbeck merely has  
6 a -- essentially an ipse dixit statement that they're  
7 not combinable. She complains that we tried to combine  
8 references, but doesn't say why they're noncombinable.  
9 There has to be an explanation or rationale behind her  
10 saying these shouldn't have been combined instead of a  
11 simple bald statement that they're noncombinable.

12 THE COURT: This is a *Daubert*.

13 ATTORNEY KEEFE: Correct.

14 THE COURT: The other one, of course, is  
15 simply a failure to use the definition, in your view.

16 ATTORNEY KEEFE: Correct, your Honor,  
17 although it is part of a *Daubert* motion as well  
18 because --

19 THE COURT: Yes, I see that.

20 All right. So go on. The third point is  
21 the commercial success.

22 ATTORNEY KEEFE: Correct. And here it's to  
23 the secondary considerations of commercial success. She  
24 does not provide any nexus for saying that Facebook's  
25 commercial success is attribute to the patented

1 contribution, and this starts wrapping us back into the  
2 first argument.

3 THE COURT: All right.

4 ATTORNEY KEEFE: Thank you, your Honor.

5 THE COURT: Mr. Hillman.

6 ATTORNEY HILLMAN: Yes, your Honor. Again,  
7 I don't understand, I have to tell you --

8 THE COURT: I'm sorry?

9 ATTORNEY HILLMAN: I don't understand how --  
10 what the argument is even if she's not complying with  
11 your Honor's definition -- construction of the privacy  
12 level information.

13 THE COURT: Well, I guess your not  
14 understanding isn't helpful to me. I wouldn't make that  
15 comment. It's never helpful for an advocate to say, "I  
16 don't understand something," because you run the risk  
17 that I do.

18 ATTORNEY HILLMAN: I apologize, your Honor.

19 THE COURT: So I think it's your position  
20 that I'm interested in understanding now.

21 ATTORNEY HILLMAN: Our position, your Honor,  
22 is that when the construction says it's information that  
23 describes or specifies which users --

24 THE COURT: User and an s. So it could be a  
25 single person.

1 ATTORNEY HILLMAN: It can be a single  
2 person.

3 THE COURT: Which user, user, or categories  
4 of users are permitted to view a particular content. Go  
5 on.

6 ATTORNEY HILLMAN: So we see that as, in  
7 substance, saying that you have to describe the metes  
8 and bounds of who is permitted to view the material.  
9 And metes and bounds doesn't change anything. It says  
10 which user, users, or categories of users are permitted.  
11 And the prior art that Ms. Keefe is relying on doesn't  
12 do that. At most it says, "Well, so-and-so is now  
13 viewing this, and they're entitled to view it." But it  
14 doesn't tell you what the metes and bounds are.

15 THE COURT: It doesn't have to. I didn't  
16 say anything about metes and bounds.

17 ATTORNEY HILLMAN: We say that the word --  
18 our position is when you say which use, users, or  
19 categories of users are permitted, that means the  
20 information has to describe or specify the individual or  
21 group that is permitted to view the material.

22 THE COURT: And what does the prior art do?

23 ATTORNEY HILLMAN: It doesn't do that.

24 THE COURT: What does it do?

25 ATTORNEY HILLMAN: It simply is prior art in

1 which some individual is viewing the material.

2 THE COURT: Allowed to view it.

3 ATTORNEY HILLMAN: Yes.

4 THE COURT: Then why isn't that the same  
5 thing?

6 ATTORNEY HILLMAN: Because that information  
7 doesn't tell which users are permitted to. It only --

8 THE COURT: If it has one user, that's  
9 enough, isn't it?

10 ATTORNEY HILLMAN: But from the fact that  
11 that one user is viewing it, there's no information that  
12 tells you whether that's the only user that can view it  
13 or whether there are other users that can view it. And  
14 so it doesn't tell you which users are permitted. The  
15 fact that you or I happen to be able to --

16 THE COURT: Is there anything in the  
17 definition that says that the configuration information  
18 has to give -- has to identify everyone who's allowed to  
19 use it?

20 ATTORNEY HILLMAN: I would argue that the  
21 word "which" implies that, yes, your Honor.

22 THE COURT: Let me hear from you, Ms. Keefe.

23 ATTORNEY KEEFE: Absolutely not, your Honor.  
24 In fact, it's a comprising claim. And so configuration  
25 information that describes which user is permitted to



1 view a particular content data is easily satisfied by  
2 the Nazim reference which shows the one user who is  
3 allowed to view.

4 THE COURT: Let me ask you this: Suppose  
5 the configuration information -- the privacy level  
6 information the configuration information identifies one  
7 person and, in fact, it's a bunch of people, but the  
8 configuration information identifies only one.

9 Does that meet the definition of privacy  
10 level information?

11 ATTORNEY KEEFE: Yes, it does, your Honor.

12 THE COURT: Why?

13 ATTORNEY KEEFE: Because it -- there is  
14 information that describes that user that is permitted  
15 to view the particular information. The fact that it's  
16 only one --

17 THE COURT: He says that the definition that  
18 I gave says which -- specifies which user, and he says  
19 that implies that you've got to tell -- got to tell us  
20 about everybody who can use it.

21 ATTORNEY KEEFE: I disagree, your Honor.  
22 Which user is you can use it or you can use it or I can  
23 use it. It doesn't have to be, "And here's a list that  
24 shows Heidi can use it, but Ms. Stameshkin cannot, nor  
25 can Mr. Marowitz, nor can Judge Ellis." It's not about

1       that, your Honor. It's just information that describes  
2       which user is permitted to use it.

3               The fact that I'm in that reference viewing  
4       my information, I am permitted to view it. That's --  
5       that's all it requires. It doesn't require anything  
6       beyond that. It doesn't require a full list or a rule  
7       or et cetera, or anything other than this user can use  
8       it while they're using it.

9               THE COURT: All right.

10              ATTORNEY KEEFE: Thank you, your Honor.

11              THE COURT: Now, let me take a recess here  
12       for a few minutes. In fact, I have under advisement a  
13       summary judgment motion.

14              ATTORNEY KEEFE: That is correct, your  
15       Honor.

16              THE COURT: What, if any, effect do the  
17       issues that have been argued today have on that?

18              ATTORNEY KEEFE: Interesting question, your  
19       Honor. It depends on what --

20              THE COURT: Not interesting. It's  
21       necessary.

22              ATTORNEY KEEFE: It is, your Honor, in the  
23       sense that the summary judgment motion itself is  
24       independent of these issues. However, as happened in  
25       the *Motorola versus Apple* case decided by Judge Posner,

1 he decided the damage is *Daubert* and then didn't get to  
2 the merits of the summary judgment motion.

3 THE COURT: As a district judge?

4 ATTORNEY KEEFE: He is a Federal Circuit  
5 judge who was sitting by designation in the --

6 THE COURT: I know who he is.

7 ATTORNEY KEEFE: -- Seventh Circuit. Sorry  
8 about that.

9 THE COURT: He was sitting as a district  
10 judge.

11 ATTORNEY KEEFE: He was. Again, not  
12 precedential, but just informative.

13 THE COURT: His colleague on the Seventh  
14 Circuit didn't fare well. Judge Easterbrook sat by  
15 designation as a district judge, and I had occasion to  
16 read his opinion which he gave extemporaneously, and it  
17 was published like that. Very good opinion. It was  
18 reversed.

19 Was Posner's decision appealed.

20 ATTORNEY KEEFE: I believe the case  
21 resolved afterwards, huh?

22 I am told it actually is pending on appeal  
23 right now, your Honor.

24 THE COURT: Tell me what, again, Posner --

25 ATTORNEY KEEFE: In that particular case,

1       there were summary judgment motions pending. There was  
2       also a series of *Daubert* challenges to -- very similar  
3       to the situation we have here. In that case, Judge  
4       Posner threw out both sides' damages experts and  
5       considered the issue of the entire case to be resolved.  
6       Since there was no damage, there was no standing. And  
7       so the case was over and did not then reach the issue of  
8       the summary judgments that were in front of him. And so  
9       that could happen here in the sense that the summary  
10      judgment motion --

11               THE COURT: The other side of that would be  
12      Mr. Hillman saying, "Oh, no, we want a chance to do-over  
13      on the damages," and then there will standing and there  
14      will be all the rest. So it would make summary judgment  
15      quite alive. But what I was asking was a different  
16      question. I think I had --

17               ATTORNEY KEEFE: They are independent of  
18      each other. The issues that we raised with Dr. Golbeck  
19      do not affect the summary judgment.

20               THE COURT: You agree with that,  
21      Mr. Hillman?

22               ATTORNEY HILLMAN: I do, your Honor.

23               THE COURT: All right. Go have lunch for  
24      30 minutes, settle the matter, but come back at quarter  
25      to 1:00 and we'll deal with this.

1 ATTORNEY KEEFE: Thank you, your Honor.

2 THE COURT: All right. Thank you. I have  
3 your slides, both of you.

4 ATTORNEY KEEFE: Thank you, your Honor.

5 THE COURT: Is that right?

6 ATTORNEY KEEFE: That is correct.

7 THE COURT: Your book I have, Mr. Hillman?

8 ATTORNEY HILLMAN: That is correct, your  
9 Honor.

10 May we leave our papers here?

11 THE COURT: Yes, you may. Yes, you may.

12 ATTORNEY KEEFE: Thank you, your Honor.

13 THE COURT: Thank you.

14 (Court recessed at 12:17 p.m.)

15 (Court called to order at 1:50 p.m.)

16 THE COURT: Well, there are two motions  
17 pending that were argued today. There's also summary  
18 judgment. And I think I'm going to -- I've devoted some  
19 effort already to summary judgment, but I think I'm  
20 going to devote more effort to these motions more  
21 immediately.

22 The argument about whether the revenue  
23 stream has been appropriately related to the patented  
24 improvement is an interesting and important question for  
25 me to resolve as well as the Rite Hite convoy issue.

1 The arguments were helpful, but I'm not confident that I  
2 am able to resolve it today. I'm going to review these  
3 cases carefully.

4 There are always -- the factual description  
5 that you gave me of the cases is helpful, but I also  
6 have to come to grips with what the real rationale is of  
7 these cases and how it should be applied to the facts of  
8 this case.

9 The motion with respect to privacy level  
10 information is really a -- in effect, causes me to  
11 examine carefully again the Markman determination that I  
12 made and to see whether the construction that the  
13 defendant is placed on it is the correct one or the one  
14 that the plaintiff places on it. So those will take me  
15 some time.

16 So I'm going to take them under advisement,  
17 and I'm going to let you hear from me as soon as  
18 possible on those. And, of course, then summary  
19 judgment, if appropriate. We have a December 10th date,  
20 and so I'm going to move with alacrity. But I have, for  
21 some reason, an abundance of patent cases right now.

22 Many years ago, we had more patent cases  
23 than even the Eastern District of Texas ever imagined.  
24 There were four judges here, and we each had about  
25 40 cases apiece, and that was crazy. That was

1 impossible. So we determined -- 40 may be the wrong  
2 number. Maybe it was 15 or 20. But still it was out --  
3 given the fact that we have a number of other cases.

4 Interestingly, this is one of the busiest  
5 per judge in the country in the criminal area. Just  
6 look it up. Its very busy. So we've farmed them out to  
7 the district. In other words, if you filed in  
8 Alexandria, you might end up in Norfolk. That's still  
9 true despite the fact that many of us -- no, strike  
10 that -- despite the fact that at least one of us thinks  
11 we ought not to do that anymore, but that's not  
12 sufficient.

13 So they still go out, but for some reason  
14 I've ended up with a number of them. There's been an  
15 explosion of these sort of business method patents, and  
16 they pose very difficult questions for both plaintiff  
17 and defendant.

18 Anyway, your arguments have been helpful.  
19 I'm sure you will ask Mr. Rodriquez to supply you with a  
20 transcript, which he will be happy to do.

21 MR. RODRIQUEZ: That is absolutely correct.

22 THE COURT: It will help support his great  
23 villa in St. Thomas and his large vehicles.

24 Thank you, and we'll proceed in that  
25 fashion. And I asked questions about what would happen

1 if, and the short answer is we'll cross any bridge if we  
2 come to it and when we come to it. I don't know what  
3 the result's going to be yet, and I don't know what the  
4 effect of that result is going to be yet. But when I  
5 get to that bridge, we'll cross it. Thank you.

6 ATTORNEY KEEFE: Thank you, your Honor.

7 ATTORNEY HILLMAN: Thank you, your Honor.

8 THE COURT: You all have a nice weekend.

9 Thank you.

10 ATTORNEY KEEFE: You do the same, your  
11 Honor.

12 (Court adjourned at 12:55.)

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1  
2  
3  
4 CERTIFICATE  
5

6 I, MICHAEL A. RODRIQUEZ, an Official Court  
7 Reporter for the United States District Court, in the  
8 Eastern District of Virginia, Alexandria Division, do  
9 hereby certify that I reported by machine shorthand, in  
10 my official capacity, the proceedings had upon the  
11 motions hearing in the case of REMBRANDT SOCIAL MEDIA,  
12 LP, v. FACEBOOK, INCORPORATED, et al.

13  
14 I further certify that I was authorized and  
15 did report by stenotype the proceedings in said motions  
16 hearing, and that the foregoing pages, numbered 1 to 61,  
17 inclusive, constitute the official transcript of said  
18 proceedings as taken from my machine shorthand notes.

19  
20 IN WITNESS WHEREOF, I have hereto subscribed  
21 my name this 16th day of October, 2013.

22  
23 /s/  
24 Michael A. Rodriquez, RPR/CM/RMR  
25 Official Court Reporter

MICHAEL A. RODRIQUEZ, RPR/CM/RMR

ADD0304

ADD0305–ADD0365  
Excerpts of Deposition of  
Dr. Jennifer A. Golbeck  
Confidential Pursuant to Protective Order

**In The Matter Of:**

*REMBRANDT SOCIAL MEDIA, LP*

*v.*

*FACEBOOK, INC. and ADDTHIS, INC.*

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*YORAM (JERRY) WIND, Ph.D. - Vol. 1*

*August 21, 2013*

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**MERRILL CORPORATION**

**LegalLink, Inc.**

135 Main Street  
4th Floor  
San Francisco, CA 94105  
Phone: 415.357.4300  
Fax: 415.357.4301

ADD0366

YORAM (JERRY) WIND, Ph.D. - 8/21/2013

Page 1

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION  
CIVIL ACTION NO. 1:13 cv 158 (TSE) (TRJ)

REMBRANDT SOCIAL MEDIAL, LP, :  
Plaintiff, :  
 :  
v. :  
 :  
FACEBOOK, INC., and ADDTHIS, :  
INC., :  
Defendant. :

Transcript of the videotape deposition of  
YORAM (JERRY) WIND, Ph.D., called for Oral  
Examination in the above-captioned matter, said  
deposition taken by and before SILVIA P. WAGE, a  
Certified Shorthand Reporter, Certified Realtime  
Reporter, Registered Professional Reporter, and  
Notary Public for the State of Pennsylvania, New  
Jersey, New York and Delaware, at the offices of  
BLANK & ROME LP, One Logan Place, 130 North 18th  
Street, 11th Floor, Conference Room 1111,  
Philadelphia, Pennsylvania, on Wednesday, August 21,  
2013, commencing at 9:35 a.m.

JOB NO. 2005-452812

1 (Deposition Exhibit Wind 1, Consumer's  
2 Perceptions of the Importance of the Various  
3 Features of Facebook June 2013 prepared by Dr. Wind,  
4 was marked for identification.) 09:26

5 THE VIDEOGRAPHER: This is the video 09:26  
6 operator speaking, David Levin of Merrill Legal 09:26  
7 Solutions, 225 Varick Street, New York, New York 09:26  
8 10014. 09:26

9 Today is Wednesday, August 21st, 2013, and 09:26  
10 the time is 9:27 a.m. 09:26

11 We are at offices of Blank Rome, 18 North 09:27  
12 Cherry Street, 11th floor, Philadelphia, 09:27  
13 Pennsylvania to take the videotape deposition of 09:27  
14 Yoram Wind, in the matter of Rembrandt Social Media 09:27  
15 LP versus Facebook Incorporated and AddThis 09:27  
16 Incorporated, in the United States District Court 09:27  
17 for the Eastern District of Virginia, Alexandria, 09:27  
18 Virginia, Civil Action No. 1:13 CV 158. 09:27

19 Will counsel please introduce themselves for 09:27  
20 the record. 09:27

21 MR. DAVIS: Ahmed Davis, Fish & 09:27  
22 Richardson on behalf of Plaintiff as well as the 09:27  
23 witness, Dr. Wind. 09:27

24 MR. MORTON: Philip Morton from 09:27  
25 Cooley LLP on behalf of the Defendant Facebook Inc. 09:27

1 tells you that for each of the features, how many 12:14  
2 points out of hundred on average were assigned to it 12:14  
3 and what were the confidence intervals around it. 12:14

4 Q. And it says it's for the global 12:14  
5 unweighted Facebook features? 12:14

6 A. Right. 12:14

7 Q. So this is based on the raw data that 12:14  
8 the survey recorded? 12:14

9 A. Correct. It takes the US respondent 12:14  
10 base respond to 11 countries, pull them together and 12:14  
11 that is the result. 12:14

12 Q. So, in this data, there was no 12:14  
13 attempt to weight the data based on the, you know, 12:14  
14 percentage of global Facebook user in the US versus 12:14  
15 international? 12:14

16 A. Correct. In the previous chart on 12:14  
17 Table A4 is the weighted that is reflecting 12:14  
18 16 percent is US and 84 percent is the 12:14  
19 international, the 11 countries. 12:14

20 Q. Okay. So turning back to the page 12:14  
21 before, A4, Page 74. 12:15

22 Okay. So this is the weighted data? 12:15

23 A. Correct. 12:15

24 Q. Okay. And so what you convey here is 12:15  
25 the relative importance of each of the features as 12:15

1 you determine from the survey and then after the 12:15  
2 data was weighted? 12:15

3 A. Correct. 12:15

4 Q. Okay. Now, how do each of the share 12:15  
5 of points correlate to Facebook's revenue? 12:15

6 MR. DAVIS: Object to the form. 12:16

7 You can answer. 12:16

8 A. By itself, it doesn't, you know, 12:16  
9 because we need additional analysis to try to do it. 12:16

10 Q. What kind of analysis do you need to 12:16  
11 do that? 12:16

12 MR. DAVIS: Objection, calls for 12:16  
13 speculation. 12:16

14 You can answer. 12:16

15 A. You can do a number of analysis. I'm 12:16  
16 not sure what the damage expert did because I've not 12:16  
17 seen his report. But the idea is if you have -- 12:16  
18 these are the characteristics, basically, of the way 12:16  
19 people perceive the relative importance of the 12:16  
20 various features. If you now can relate this to the 12:16  
21 actual usage of people, you can get an answer. If 12:16  
22 you can relate this, as we discussed earlier today, 12:16  
23 to the advertiser's perception of the value of 12:16  
24 advertising there, you can start estimating. So 12:16  
25 there are many ways in which you can start doing it. 12:16

1 All what I did is just do this analysis to 12:16  
2 try to answer the question, what is the relative 12:16  
3 importance of each of the features as a driver of 12:17  
4 the usage of Facebook. And now if you want to try 12:17  
5 to link to revenue, you need additional analysis. 12:17

6 Q. So taking an example, the fourth item 12:17  
7 from the bottom, Facebook's targeted ads, the 12:17  
8 relative importance of this feature is 0.6 percent. 12:17  
9 And does that mean that 0.6 percent of Facebook's 12:17  
10 revenue can be attributed to that feature? 12:17

11 MR. DAVIS: Object to the form. 12:17

12 A. Not -- 12:17

13 MR. DAVIS: Hold on. Hold on. 12:17

14 Object to form, incomplete hypothetical. 12:17

15 You can answer. 12:17

16 THE WITNESS: Sorry. 12:17

17 MR. DAVIS: It's alright. You have 12:17  
18 to give me a second to put an objection in. 12:17

19 A. Not by itself. And, also, keep in 12:17  
20 mind that this is the consumer perception. So, from 12:17  
21 consumer point of view, they don't like ads, 12:18  
22 especially, they don't like interrupting meaningless 12:18  
23 ads, yet ads is the source of revenue of Facebook. 12:18  
24 So by itself looking at this variable, you cannot 12:18  
25 say anything. 12:18





1 analysis. 12:19

2 Q. Okay. So, just to be clear, you 12:19

3 don't contend that the relative importance of each 12:20

4 of these features is directly correlated to 12:20

5 Facebook's revenue? 12:20

6 MR. DAVIS: Object to the form, asked 12:20

7 and answered, incomplete hypothetical. 12:20

8 You can answer. 12:20

9 A. Now you changed on me the basis. You 12:20

10 added the word "correlate" here. 12:20

11 It may be correlated. But keep in mind that 12:20

12 I'm the -- the data here reflect very simple direct 12:20

13 questions to consumers on how important is it, the 12:20

14 relative importance, in driving new usage of 12:20

15 Facebook. 12:20

16 Anything else I want to do with this data, 12:20

17 any statistical analysis, any modelling I want to do 12:20

18 with this is fine, but it's separate that will try 12:20

19 to link this and perhaps other data sources to 12:20

20 revenues. So they may be correlated in some 12:20

21 analysis. 12:20

22 But the data that we represent is the data 12:20

23 that tells us that these are the relative importance 12:21

24 consumer attributes to each of these features as a 12:21

25 driver of their usage of Facebook. 12:21

1 Q. Okay. And you're not expressing any 12:21  
2 opinion about how the users usage of Facebook is 12:21  
3 related to revenue? 12:21

4 A. Correct. 12:21

5 Q. Okay. 12:21

6 A. Because I've not done any analysis 12:21  
7 along this line nor was I asked to. I was just 12:21  
8 asked to provide this as input to the damage model. 12:21

9 So I assume the damage model is the one to 12:21  
10 try to establish the link. I am not. I have not 12:21  
11 tried to do anything along this line. 12:21

12 Q. Okay. And you're not expressing any 12:21  
13 opinion about how the surveyed user's usage of 12:21  
14 Facebook is related to the demand for these 12:21  
15 particular features? 12:21

16 A. No. I think that, basically -- 12:22  
17 again, I cannot give you a quantifiable number of 12:22  
18 the relative impact of this on demand. But given 12:22  
19 the fact that we're using here all features that the 12:22  
20 respondent actually uses and given my general 12:22  
21 experience with this type of methodology, I would 12:22  
22 say that these will be highly predictive of demand. 12:22


23 And I've used many, many studies like this 12:22  
24 that use constant sum evaluation with other methods 12:22  
25 with it in providing companies guidelines for 12:22

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C E R T I F I C A T E

I, SILVIA P. WAGE, a Notary Public and  
Certified Court Reporter of the State of New Jersey,  
License No. 30X100182700, Certified Realtime  
Reporter and Registered Professional Reporter, do  
hereby certify that prior to the commencement of the  
examination, YORAM (JERRY) WIND, Ph.D., was duly  
sworn by me to testify the truth, the whole truth  
and nothing but the truth.

I DO FURTHER CERTIFY that the foregoing is a  
true and accurate transcript of the testimony as  
taken stenographically by and before me at the time,  
place and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a  
relative nor employee nor attorney nor counsel of  
any of the parties to this action, and that I am  
neither a relative nor employee of such attorney or  
counsel, and that I am not financially interested in  
the action.



Notary Public of the State of New Jersey  
My Commission expires November 9, 2012  
Dated: August 23, 2013

ADD0375

ADD0376—ADD0426  
Expert Rebuttal Report of  
Professor Marco Iansiti  
Confidential Pursuant to Protective Order

### **CERTIFICATE OF SERVICE**

I, Lucas Townsend, hereby certify that on December 26, 2013, copies of the following documents described as:

- Facebook, Inc.'s Non-confidential Response to Rembrandt Social Media, LP's Petition for Allowance of An Interlocutory Appeal
- Addendum
- Certificate of Interest for Facebook, Inc.

were electronically filed with the Clerk of the Court using CM/ECF and served via electronic mail on the following counsel:

Ahmed J. Davis  
Fish & Richardson P.C.  
1425 K Street, N.W., 11th Floor  
Washington, DC 20005  
Tel: (202) 783-5057  
Fax: (202) 783-2331  
adavis@fr.com

*Counsel for Rembrandt Social Media, LP*

/s/ Lucas C. Townsend

Lucas C. Townsend  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036  
(202) 887-3731  
(202) 530-4254 (fax)  
ltownsend@gibsondunn.com